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No. _____

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In The

Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

VS:

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; RUTH SCHARF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does a district court's federal question jurisdiction over a claim for contempt of court permit it to exercise supplemental jurisdiction over pendent state law claims?

2. Does "related to" jurisdiction exist under 28 U.S.C. § 1334 when a complaint is filed in a bankruptcy adversary proceeding containing allegations, the resolution of which could have a considerable effect on a pending plan then being administered in the bankruptcy?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit is contained in the caption of this Petition.

The Petitioner, New Horizon of New York LLC is a New York limited liability company. There is no parent or publicly held company owning 10% or more of the company's stock.

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Petitioner New Horizon of New York, LLC, respectfully requests that a writ of certiorari be issued to review the decisions of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and is reported at 231 F.3d 143 (4th Cir. 2000), and contained in the Appendix hereto. In addition, the Fourth Circuit's order summarily reversing the related appeal concerning attorneys' fees in Case No. 00-1701, and the July 19, 1999 Order of the U.S. District Court for the Eastern District of North Carolina, are contained in the Appendix.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on November 2, 2000. The Fourth Circuit denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on November 28, 2000.

This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 401 provides that "a court of the United States shall have power to punish . . . contempt of its authority . . . ."

Title 28 U.S.C. § 1334(b) provides that "the district courts shall have original . . . jurisdiction of all civil proceedings . . . arising in or related to cases under Title 11."

Title 28 U.S.C. § 1367 provides that "the district courts shall have supplemental jurisdiction over all other claims that are . . . related to claims in the action within . . . original jurisdiction [and] form part of the same case or controversy under Article III."

STATEMENT OF THE CASE

This matter arises out of a consensual Chapter 11 bankruptcy plan of reorganization in which the Respondents/Defendants gained millions of dollars in benefits while sabotaging a valuable option benefit going to Petitioner/Plaintiff New Horizon of New York, LLC ("Horizon"). Defendants carried out the sabotage primarily by filing a baseless opposition to approval of an option contract in the United States Bankruptcy Court for the Eastern District of North Carolina, and followed that by taking and maintaining a frivolous appeal of the order granting approval of the option contract until Horizon's exclusive option to purchase valuable promissory notes expired. The evidence at trial demonstrated that the Defendants, acting individually and through their designated attorneys, secretly cooperated with each other in a series of subterfuges designed to mislead the bankruptcy court and the other parties involved in the bankruptcy, while assuring that the Defendants would receive their benefits under the plan of reorganization.

In the lawsuit below, Horizon contended that the Defendants' sabotage tortiously interfered with Horizon's contractual rights; constituted abuse of process; amounted to malicious prosecution; breached the bankruptcy plan of reorganization, a contract under law; violated the North Carolina Unfair or Deceptive Trade Practices Act ("UTPA"); and constituted civil contempt of the bankruptcy court's Confirmation Order.

After a three and one-half week trial, the jury returned a verdict finding Defendants liable on all counts submitted, and assessed compensatory damages of $6,491,835.00.[1] Punitive damages were also assessed against most Defendants, and the jury answered affirmatively a number of special interrogatories related to the UTPA claim. During the jury trial, the Senior District Judge for the Eastern District of North Carolina heard evidence on the civil contempt count. On July 19, 1999, the District Judge entered a final order and judgment awarding Horizon treble damages and attorneys' fees against all but two of the Defendants, for a total judgment of $22,292,102.70 While noting that the Defendants "may be deserving of punitive sanctions" for their "egregious" acts, the Court held against Horizon on its civil contempt claim (Order contained in the Appendix hereto). -

The Defendants appealed the jury verdict and the award of treble damages and attorneys' fees to the United States Court of Appeals for the Fourth Circuit. In an opinion issued November 2, 2000, New Horizon of NY LLC v. Jacobs, 231 F.3d 143 (4th Cir. 2000) (Opinion contained in the Appendix hereto), the Fourth Circuit vacated the judgment and remanded the matter to the district court for dismissal without prejudice for lack of federal subject matter jurisdiction. In a later order, the Fourth Circuit also summarily reversed the district court order awarding statutory attorneys' fees (Opinion contained in the Appendix hereto). Horizon filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 14, 2000. The court denied that Petition for Rehearing on November 28, 2000.

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[1] With pre-judgment interest, the compensatory damages amounted to $7,430,700.90.

FACTUAL SUMMARY

The following is a condensed recitation of the key facts proven at the trial below. These facts are important for the understanding of the two issues presented in this Petition - that is, federal jurisdiction based upon a substantial federal cause of action for contempt of court, and federal jurisdiction based upon matters "related to" a bankruptcy case.

AJ & AJ Servicing, Inc. ("AJ"), the debtor in the Chapter 11 proceeding below, was a New Jersey corporation previously controlled by Defendants Robert Jacobs, Alan Jacobs,[2] and Elliot Jacobs (together with Allan Mirwis, EJ Servicing, Inc., EJ Realty Management, Inc. and EJ Property Consultants, the "Jacobs Group"). Alan Jacobs is Robert Jacobs' brother. Elliott Jacobs is Robert Jacobs' son. Allan Mirwis is Robert Jacobs' brother-in-law.

In 1993, members of the Jacobs Group and AJ were found liable for fraud, and a judgment in the amount of $3,319,572 in compensatory damages and $350,000 in punitive damages was entered against them in Durham County, North Carolina, Superior Court, in favor of two New Jersey limited partnerships, New British Woods Associates ("NBW") and New Yorktown Associates ("NYA") (collectively, the "Partnerships").[3]

Later in 1993, a separate judgment issued in favor of Tudor Associates, Ltd. II, a Nebraska limited partnership ("Tudor"), by the United States District Court for the Eastern

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[2] Alan Jacobs was dismissed from this action during trial and was not a party to the appeal.

[3] Defendants Lane, Scharf, DaPuzzo, Rosen, Born, Queller, and David Queller, Inc. were limited partners of the Partnerships. They appeared as a group in the AJ bankruptcy proceedings and repeatedly identified themselves in their pleadings as the "Independent Limited Partners." They will be referred to herein as the "Independent Limited Partners" or the "ILPs."

District of North Carolina on a jury verdict against members of the Jacobs Group and AJ for compensatory and punitive damages totaling in excess of $7,000,000. The Fourth Circuit Court of Appeals affirmed the judgment. See Tudor Assoc., Ltd. II v. AJ & AJ Servicing, Inc., 36 F.3d 1094 (4th Cir. 1994) (unpublished opinion) (contained in the Appendix hereto).

Following entry of judgment in the 1993 proceedings against it, AJ filed for bankruptcy protection. Numerous contestants competed for AJ's assets, and after three years of negotiation, and the institution of no fewer than seven adversary proceedings, all parties in interest reached a settlement of all disputed claims in 1996. The terms of the settlement were memorialized in the September 26, 1996 Order of the United States Bankruptcy Court for the Eastern District of North Carolina (the "Confirmation Order"), confirming a consensual plan for reorganization of AJ. The Confirmation Order incorporated the terms of the negotiated settlement into the plan (hereinafter the "Confirmed Plan").

AJ's principal asset was a one-half interest in two promissory notes secured by apartment properties located in Durham County, North Carolina (hereinafter the "Notes"). Tudor, also in its own bankruptcy proceeding in the Eastern District of North Carolina, owned the remaining one-half interest in the Notes. The Confirmed Plan required AJ to assign its one-half interest in the Notes to Tudor, giving Tudor a 100% interest. Tudor would then extend the due date on the Notes, otherwise due on September 1, 1999, for 25 years, until 2025; Tudor also agreed to lift its prior declaration that the Notes were in default.

The Confirmed Plan also provided for Tudor to grant to the Sonnenschine Group or its designee, Horizon, an option to purchase the Note. The Sonnenschine Group had previously pursued the successful lawsuit in the names of the Partnerships resulting in the N.C. State Court judgment for fraud in the amount of $3,319,572 against AJ and the Jacobs

Group. This option would be separately approved through the Tudor bankruptcy proceeding, inasmuch as the Tudor partners and creditors needed to consent to the sale. All of the participants in the AJ bankruptcy consented to and were bound by the Plan.

The Confirmed Plan allocated three significant sets of benefits to the various participants:

1. The members of the Jacobs Group would have judgments against them canceled and vacated, relieving them of liability in excess of $11,000,000; in addition, various additional claims against them would be dropped, totaling in excess of $10,000,000.

2. Because of the 25-year extension of the Notes and the lifting of the default declaration, the limited partners of NBW and NYA (including the ILPs) would avoid federal income tax recapture for these tax shelter investments; the minimum estimated value of this tax savings was $10,000,000. Further, various other obligations of the Partnerships for legal fees and other expenses, amounting to over $2,000,000, were cut in half, and the Partnerships were guaranteed an annual cash flow of $75,000 for 25 years.

3. Horizon, as designee of the Sonnenschine Group,[4] was given the exclusive option to purchase the Notes for the favorable purchase price of $15.75 million. It was contemplated that commercial financing would be sought to fund the transaction. The evidence at trial demonstrated that the present-day net value of this purchase opportunity to Horizon amounted to $14,286,442.

Gerald Cohen, a New York attorney and long-time associate of Robert Jacobs, had been retained by and appeared on behalf of each of the ILPs in the AJ bankruptcy in early 1996. He had filed a number of pleadings on their behalf prior to the September 26, 1996 confirmation hearing. The ILPs knew, from the outset, that Jacobs and Cohen were collaborating; indeed, most of the ILPs retained Cohen at the suggestion of Jacobs.

Cohen came to Raleigh, North Carolina, for purposes of attending the confirmation hearing, but decided at the last minute to intentionally absent himself from the hearing so as to avoid being asked by the court whether he consented to the plan. He stated that he did this to "preserve the limited partners' future options."

On October 1, 1996, Cohen wrote to his ILP clients advising them of this conduct and telling them that as a result of the hearing and the Confirmed Plan, two "disaster[s]" occurred – that is, the ordering of the payment of legal fees

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[4] Horizon is a New York limited liability company, owned entirely by the eight children of Samuel Sonnenschine and Sherman Taub. Sonnenschine and Taub are the managers of Horizon, but have no ownership interest.

to the law firms of Tenzer Greenblatt and Moore & Van Allen, and the giving of an option to Samuel Sonnenschine to purchase the Notes. Cohen forwarded to his clients an additional letter dated September 24, 1996, which he had written to A.T. "Pete" Parsons, Jr. ("Parsons"), the general partner of the Partnerships, setting out his opposition to the option granted to Horizon. In that letter he stated in the final paragraph:

> My clients will expect me to do everything in my power to prevent you from giving Sonnenschine the ability to control the mortgage notes.

Thus, Cohen, for the ILPs, intentionally maintained his strategic silence, and while secretly harboring the intent and plan to fight the option, allowed the bankruptcy court to enter the Confirmation Order. Cohen concluded his October 1, letter to his clients as follows:

> Before I take any further action, I would like to have your input and approval to decide what the costs and risks of certain actions are as opposed to the possible consequences of simply doing nothing.

The ILPs were fully advised of their attorney's plan of action and were even solicited for their input and approval. They voiced no disagreement.

Robert Jacobs appeared at the September 26 hearing and personally consented to the plan, although he was strongly opposed to the option provision. E.D. Gaskins, as counsel for the entire Jacobs Group, also signed the Order, as did Malvern King, as counsel for the Partnerships.

On October 7, 1996, Cohen filed in the AJ bankruptcy on behalf of the ILPs a Notice of Appeal of the

Confirmation Order, purporting to appeal precisely the same two issues that were raised in his September 24 and October 1 letters – that is, payment of fees to the law firms and the granting of an exclusive option "to Samuel Sonnenschine to purchase the mortgage notes." Cohen testified that he prepared this Notice upon the recommendation and with the assistance of Gaskins and Albert Lawler (another attorney who represented the Jacobs Group). It was his regular practice to seek such guidance and consultation.

On October 9, 1996, Joseph Callaway, the Tudor Bankruptcy Trustee, wrote to Cohen demanding that he withdraw the appeal and threatening sanctions. Callaway stated:

> However, we are all aware that you are merely a puppet for the Jacobs interests. You have admitted to me that Mr. Lawler largely drafted the appeal.

Cohen did not deny these statements. Thus, within ten days of entry of the Confirmation Order to which the Jacobs Group had consented in open court, two of their lawyers (Lawler and Gaskins) were actively assisting Cohen in taking an appeal from the Confirmation Order. Because they had not yet received their own benefits from the plan (i.e., the cancellation of the judgments against them), [5] the Jacobs Group needed to sabotage the transaction covertly, using the ILPs as their allies.

Cohen testified that Callaway persuaded him that the appeal lacked merit and, on October 18, 1996, Cohen withdrew the ILPs' appeal in the AJ bankruptcy. Once the appeal was withdrawn, the Confirmation Order became final and binding on all parties. Thus, no one subject to the Order

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[5] The last judgment against the Jacobs Group was not canceled until December 6, 1996.

could thereafter permissibly object to the granting of the option to Horizon.

On November 1, 1996, Callaway filed a motion in the Tudor bankruptcy (as the Confirmed Plan contemplated) to obtain approval of the Option Agreement between Tudor and Horizon.[6] The ILPs, who were neither parties nor creditors in the Tudor bankruptcy and had never before filed any pleadings there, nonetheless purported to file an Opposition to Callaway's motion. Cohen acknowledged that he was provided with information and documents by Robert Jacobs that he used in this Opposition.[7] On November 19, Cohen wrote to Judge Leonard requesting that he reject the option to Horizon and stating that Cohen wished to appear at the November 25 Tudor hearing to argue and present testimonial evidence supporting his Opposition.

Cohen failed to show at the Tudor bankruptcy hearing, and no attorney appeared claiming to represent the ILPs. The Bankruptcy Judge noted that he had received the written opposition from Cohen, but that it was sent COD to the court, and was not signed by local counsel. The court rejected the filing. The Bankruptcy Judge approved the Option Agreement at the hearing and subsequently entered an order (the "Option Order").

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[6] Bankruptcy Judge J. Rich Leonard was the bankruptcy judge for both the AJ and Tudor cases.

[7] Cohen defined his purpose in filing the Opposition when he wrote to his ILP clients on November 29, 1996, forwarding a copy of the Opposition: "Enclosed please find a copy of a motion I filed to try to **stop Sonnenschine and Taub from being able to purchase the wrap around mortgage notes on the properties**. . . ." (emphasis added). The purpose, articulated first by Cohen on September 24, 1996, and continuing through the expiration of the option on January 15, 1997, was plain and simple: to prevent the sale of the Notes to Horizon.

On December 4, two days before the appeal period on the Option Order expired, Mr. Gaskins contacted Steve Beaman, a North Carolina attorney, and persuaded him to prepare and sign a Notice of Appeal of the Option Order, as local counsel for Cohen and the ILPs. This appeal, taken in the names of the ILPs, was filed on December 6, 1996. Cohen sent a copy of the Notice of Appeal, along with another explanatory letter, to his ILP clients on December 11.

The pendency of the appeal interfered with Horizon's efforts to obtain bank financing and title insurance necessary to close the sale. A scheduled closing of the option had to be postponed so as to allow the parties some additional time to try and work around the issues raised by the appeal. On December 20, 1996, by letter, as well as in additional telephone conversations, Callaway notified Cohen, Beaman, Gaskins and Lawler, that they were exposing themselves and their clients to liability for tortious interference with contract, as well as for treble damages for UTPA violations. He expressed his view that the appeal was filed in bad faith for purposes of interfering with the sale. Thus, all of the Defendants, through their designated counsel, were given explicit notice of the tortious nature of their conduct and the damages to which they were being exposed.

Throughout, Robert and Elliot Jacobs had personal interests in pursuing the purchase of the Notes for themselves and on behalf of another entity, Greystone, in which Robert Jacobs had a financial interest. While seeking to undermine the sale to Horizon, Jacobs and Cohen were simultaneously pressing Callaway and the bankruptcy court to sell the notes to Greystone. Indeed, during the exclusive option period, Greystone sent a November 20, 1996 letter to Callaway and Parsons, offering to purchase the Notes. Jacobs was a blind copy recipient of Greystone's letter, and the evidence at trial showed that Jacobs had actively solicited the letter from

Greystone so that its timing would correspond with the Opposition to be filed by Cohen. Beaman, the ILPs' local counsel, continued to dangle the prospect of a sale to Greystone before Callaway as late as January 14, 1997, when it finally became apparent that the option sale to Horizon could not close.

Meanwhile, the ILPs failed to timely file their Designation of Record and Issues on Appeal. Callaway filed a motion to dismiss the appeal and sought expedited consideration thereof. On January 3, 1997, the ILPs filed a Response opposing expedited consideration of Tudor's motion to dismiss, in a further attempt to keep the appeal alive. On January 16, 1997, one day after the Option's expiration, the district court dismissed the appeal, citing the untimely Designation of Record, and observing that the substantive arguments advanced in the motion to dismiss appeared to have merit.

Substantial evidence was presented at trial that the Horizon sale would have closed before the January 15 deadline but for the pending appeal. Once the Horizon option failed, the ILPs abandoned all pretense of pursuing their opposition to the wording of the Option Agreement, and no further appeal was taken from the dismissal by the district court.

Cohen and Jacobs were jubilant over their success in defeating the option. On February 5, 1997, Cohen wrote to his ILP clients trumpeting that "Sonnenschine lost his option and the $250,000 deposit he made for same." The very next day, on February 6, 1997, Robert Jacobs himself wrote to the ILPs, noting the "incredible job" that Gerald Cohen had done for them and suggesting to the ILPs that they forward $20,000 in fees to Cohen for his services rendered, to be paid according to a percentage breakdown that Jacobs conveniently attached to his letter. The ILPs paid the fees. There could be no clearer evidence of the unity of purpose and complicity of action between Jacobs and the ILPs.

Horizon filed this lawsuit on February 25, 1997, in the United States District Court for the Eastern District of North Carolina.[8] At the time of its filing, the AJ Plan of Reorganization was still pending, but lacked funding to carry out the necessary transfer of benefits to the various creditors of AJ. The exclusive option to Horizon had expired, and there were a number of potential contestants to purchase the promissory notes, including Horizon itself. In an effort to exclude Horizon as a purchaser of the notes, some or all of the Defendants were arguing each of the following points:

1. that the Defendants' consent to the Plan was obtained under duress;

2. that the Plan required an interpretation whereby the notes could only be sold with financing of no more than 77% of the cash flow of the underlying properties (which interpretation would exclude the financing contemplated by Horizon);

3. that Horizon's managers had unclean hands, which would prohibit Horizon from being a purchaser of the notes;

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[8] The case was subsequently transferred, upon motion of the defendants, to the United States Bankruptcy Court for the Eastern District of North Carolina, because the defendants contended that the case was "related to" the A.J. Bankruptcy. Ultimately, the case was transferred back to the District Court which conducted the jury trial as well as the contempt trial.

4. that Horizon could not be a permissible purchaser of the notes because a sale to Horizon would purportedly lead to federal income tax recapture for various Defendants;

and

5. that the conduct of the Defendants in undermining the Horizon option contained in the bankruptcy plan was not violative of the bankruptcy plan and, thus, did not constitute contempt of court.

Had the trial court ruled in Defendants' favor on any of the above-noted points, the result would have had a significant impact upon the pending A.J. plan of reorganization.

REASONS FOR GRANTING THE WRIT

In vacating the lower court's judgment in its entirety for lack of federal subject matter jurisdiction, the Fourth Circuit departed significantly from the holdings of several decisions of this Court regarding pendent jurisdiction and "related to" bankruptcy jurisdiction. In addition, the Fourth Circuit deviated from the clear meaning of several federal statutes providing for subject matter jurisdiction.

The question of subject matter jurisdiction has been deemed significant enough to warrant a grant of certiorari. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 8 (1951) ("as prompt, economical, and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts," grant of certiorari was appropriate). Jurisdiction is the cornerstone of federal jurisprudence. Where, as here, the petitioner has been

deprived of the federal forum for the full resolution of its claims, after a full merits trial, such an outcome is particularly egregious and unfair, warranting review and reversal by this Court.

I. HORIZON'S PETITION FOR CERTIORARI PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW REGARDING THE EXISTENCE OF FEDERAL QUESTION JURISDICTION UNDER 18 U.S.C. § 401, AND A FEDERAL DISTRICT COURT'S EXERCISE OF SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS IN SUCH AN ACTION.

A. The Fourth Circuit's Decision Is Inconsistent With The Plain Meaning Of 18 U.S.C. § 401.

Title 18 U.S.C. § 401 vests jurisdiction in the United States courts to enforce their own orders – "[a] court of the United States shall have power to punish . . . contempt of its authority, and none other . . . ." 18 U.S.C. § 401. The federal district court, therefore, had exclusive subject matter jurisdiction to determine the appropriate remedy for violation of the Confirmed Order, as the Order was issued by the bankruptcy court operating as a unit of the district court. See Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 133 (1995) (actions of bankruptcy court treated like actions of district court). The district court ultimately ruled against Horizon on the contempt of court claim, but only after a full trial and merits review of the claim. There can be no question that the district court possessed federal question subject matter jurisdiction to hear and decide the contempt claim.

B. The Fourth Circuit's Decision Is Inconsistent With The Supplemental Jurisdiction Statute And With This Court's Precedent Regarding Exercise Of Supplemental Jurisdiction Over Pendent State Law Claims.

Inasmuch as Horizon's federal contempt claim, on its face, was substantial enough to cause the district court to address its merits, the district court had discretion to exercise supplemental jurisdiction over the pendent state law claims deriving from a common nucleus of operative fact. 28 U.S.C. § 1367; United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). The Fourth Circuit's decision flies in the face of the clear holding of this Court in Rosado v. Wyman, 397 U.S. 397 (1970), where this Court highlighted the "common sense policy of pendent jurisdiction - the conservation of judicial energy and the avoidance of multiplicity of litigation" and held that the district court properly proceeded to exercise jurisdiction over pendent state law claims despite the fact that the federal claim had been dismissed. 397 U.S. at 404, 405.

Moreover, the Fourth Circuit's decision contravenes even its own prior precedent regarding federal jurisdiction over pendent state law claims. In Ridenour v. Andrews Federal Credit Union, 897 F.2d 715, 719-21 (4th Cir. 1990), the Fourth Circuit held that despite dismissal of the federal claim by the trial court, the trial court still had the discretion to retain jurisdiction over pendent state law claims. In that case, the federal cause of action was dismissed before trial, yet the Fourth Circuit upheld the discretion of the district court to retain pendent jurisdiction over state law claims. A similar result was endorsed in Shanaghan v. Cahill, 58 F.3d 106, 110, 112 (4th Cir. 1995), where the Fourth Circuit actually reversed the district court's dismissal of pendent state law claims and remanded the case with instruction to the district judge to

exercise discretion with regard to retention of the pendent state claims. The Fourth Circuit noted that the district judge had "wide latitude" in exercising this discretion and that the district court should consider, among other things, "the amount of time and energy that has already been expended" as well as "the interest of judicial economy." Id. at 110, 112. The Fourth Circuit inexplicably ignored this precedent in the case at hand and directed the dismissal of pendent state law claims, where the federal cause of action for contempt had survived numerous dispositive motions and was tried on its merits. This result flatly contravenes the well-established body of federal jurisprudence concerning pendent/supplemental jurisdiction.

II. HORIZON'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE "RELATED TO" JURISDICTION EXISTED UNDER 28 U.S.C. § 1334(b).

A. The Fourth Circuit Failed To Apply The Clear Wording Of 28 U.S.C. § 1334(b), Its Own Precedent, And The Holdings Of This Court.

28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings . . . arising in or related to cases under Title 11." In Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995), this Court articulated broad standards for "related to" jurisdiction in the bankruptcy court, particularly when dealing with a reorganization under Chapter 11. This Court expressed its agreement with the Third Circuit's decision in Pacor v. Higgins, 743 F.2d 984 (3d. Cir. 1984) that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" and that the

"related to" language of Section 1334(b) must be read to give district courts jurisdiction over more than simple proceedings involving the property of the debtor or the estate. 514 U.S. at 308.

The issues raised in Horizon's Complaint concerning sale of the promissory notes (which were the primary asset of the AJ bankruptcy) and enforcement of the plan of reorganization of the bankruptcy court certainly involved the property of the debtor and, more importantly, called into question the interpretation and binding effect of the pending plan of reorganization. Defendants' contemporaneous contentions regarding the enforceability of the plan could have given rise to the following:

- a lower court's ruling that Horizon could not be a permissible purchaser of the notes because of purported concerns for income tax recapture;

- a lower court's ruling that a sale would be violative of the plan if it involved financing greater than 77% of cash flow for the properties;

- a lower court's ruling that the plan was void for duress or illegality.

Any of these rulings could and would have had a direct and substantive effect on the plan of reorganization which was then being administered. The effect of the Fourth Circuit decision is that issues such as these must be litigated in state court, while a bankruptcy plan is being administered in the bankruptcy court. Such a result not only defies common sense but would be entirely inconsistent with the wording of § 1334(b) and the interpretation of that statute by this Court. The district court correctly considered and appreciated these

circumstances and exercised its jurisdiction over the entire lawsuit. The Fourth Circuit erred.

The Fourth Circuit also ignored this Court's holding in Freeport McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991) that "if jurisdiction exists at the time an action is ***commenced***, such jurisdiction may not be divested by subsequent events," id. at 428 (emphasis added). The Fourth Circuit, itself, articulated a similar standard in In re Celotex Corp., 124 F.3d 619 (1997), where it stated that the test for "related to" jurisdiction was "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . ." The court went on to state that its analysis may not be informed by its knowledge of subsequent events, id. at 625, 626. Yet here the Fourth Circuit ignored these basic principles and considered events that occurred in connection with the AJ bankruptcy well after the commencement of this lawsuit in February, 1997, and, on that basis, divested the district court of subject matter jurisdiction. At page 20 of its opinion, for example, the Fourth Circuit stated that because the promissory notes were ultimately sold to a different purchaser in September, 1997, for a higher price than the Horizon option price, the Tudor and AJ estates ultimately realized a benefit, and there was, thus, no adverse effect on the bankruptcy plan.[9] Similarly, the panel noted at page 20 of its opinion that "the AJ estate was settled months before and unaffected by the trial in this case" – again, an analysis of events after the filing of the lawsuit. This retrospective analysis directly contravenes the holding in Freeport as well as the Fourth Circuit's own precedent.

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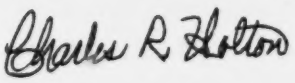
[9] The very suggestion of this fact highlights the error in the panel's analysis. What if the notes were sold in September 1997 for less than what Horizon was prepared to pay? Surely this would adversely impact the Tudor and AJ estates. Standing in February 1997 when the lawsuit was filed, this possibility was every bit as conceivable as what actually occurred.

CONCLUSION

This case presents significant questions of federal subject matter jurisdiction both with regard to supplemental/pendent jurisdiction over state law claims, and with regard to "related to" jurisdiction under 28 U.S.C. § 1334(b). The holding of the Fourth Circuit substantially conflicts with relevant decisions of this Court as well as precedent from the Fourth Circuit.

WHEREFORE, Petitioner New Horizon of New York, LLC, respectfully requests the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,



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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1990

NEW HORIZON OF NY LLC,

Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,

Defendants-Appellants,

and

ALAN JACOBS[1]; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.[2]; RUTH SCHARF,

Defendants.

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[1] Alan Jacobs was dismissed following trial and is not a party to this appeal.

[2] Dr. Rosen died during the pendency of the appeal and his personal representative has been substituted as a party.

No. 99-1996

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of Howard Rosen, M.D.; RUTH SCHARF,

Defendants-Appellants,

and

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E. J. SERVICING, INCORPORATED; E. J. REALTY MANAGEMENT CORPORATION; E. J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INCORPORATED; IRA BORN; ALAN JACOBS,

Defendants.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-97-126-5-BR)

Argued: June 6, 2000
Decided: November 2, 2000
Entered: November 2, 2000

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Michael and Judge Motz joined.

COUNSEL

ARGUED: Nathan Lewin, MILLER, CASSIDY, LARROCA & LEWIN, L.L.P., Washington, D.C.; James G. Exum, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Raleigh, North Carolina, for Appellants. Charles Robert Holton, MOORE & VAN ALLEN, P.L.L.C., Durham, North Carolina, for Appellee. **ON BRIEF:** Paul F. Enzinna, Mark A. Miller, MILLER, CASSIDY, LARROCA & LEWIN, L.L.P., Washington, D.C.; Matthew W. Sawchak, Paul K. Sun, Jr., Julia F. Youngman, Allison K. Overbay, SMITH, HELMS, MULLISS & MOORE, L.L.P., Raleigh, North Carolina; Robert O. Jenkins, Phillip R. Miller, III, BLANCHARD, JENKINS & MILLER, P.A., Raleigh, North Carolina, for Appellants. Laura B. Luger, Pamela A. Wachter, MOORE & VAN ALLEN, P.L.L.C., Durham, North Carolina, for Appellee.

OPINION

WIDENER, Circuit Judge:

New Horizon of New York, L.L.C. (New Horizon) filed a six count complaint against fourteen defendants[1] in the United States District Court for the Eastern District of North Carolina. In its complaint, New Horizon alleged under state law that the defendants engaged in tortious interference of contractual relations, unfair and deceptive trade practices, breach of contract, malicious prosecution, and abuse of process; and, under federal law, civil contempt of court. On November 25, 1998, a jury found in favor of New Horizon on its state law claims and awarded New Horizon damages in excess of six million dollars. The district court conducted a bench trial on the civil contempt of court claim and on New Horizon's requests for trebled damages for the unfair and deceptive trade practice count, sanctions against the defendants, and attorneys' fees. On July 19, 1999, the district court denied New Horizon's request for relief on its civil contempt claim and denied the various motions for sanctions. The district court also denied the Jacobs Group defendants' and the Independent Limited Partners defendants' motions for judgment as a matter of law and for a new trial. The district court entered final judgment on July 26, 1999. The defendants appeal from that order. We vacate the judgment of the district court and remand the case to the district court to dismiss the action without prejudice for want of jurisdiction.

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[1] The defendants participating in the appeal are divided into two groups. Defendants Robert Jacobs, Elliott Jacobs, Allan Mirwis, E.J. Servicing, Inc., E.J. Realty Management Corp., E.J. Property Consultants, David Queller, David Queller, Inc., and Ira Born will be referred to as the Jacobs Group defendants. Defendants Drs. Stanley Lane and Howard Rosen, Peter Dapuzzo and Ruth Scharf will be referred to as the Independent Limited Partners defendants.

I.

The facts of this case involve two somewhat complex bankruptcy cases commenced in the Eastern District of North Carolina: In re Tudor Associates, Ltd. II, No. 77-BK-06-04, and In re AJ & AJ Servicing, Inc., No. 94-00135-8-JRL.[2] The Tudor bankruptcy began in 1977, and the AJ bankruptcy began in 1994. We recite only those facts pertinent to the instant controversy and relevant to this disposition.

The defendants in this case are the Jacobs Group and the Independent Limited Partners. The Jacobs Group consists of: Robert Jacobs and Elliot Jacobs, two of the owners of AJ & AJ Servicing Corporation (AJ); Allan Mirwis, who had been a general partner in New British Woods Associates (New British) and New Yorktown Associates (New Yorktown) and later became a limited partner of those partnerships; E.J. Servicing, Inc., E.J. Realty Management, Inc. and E.J. Property Consultants (collectively, the E.J. companies), controlled by Robert Jacobs and Elliott Jacobs; Ira Born, a limited partner in New British and New Yorktown; David Queller; and David Queller, Inc. The Independent Limited Partners are Dr. Lane, a cancer surgeon; Dr. Rosen, an orthopedist; Peter DaPuzzo, a managing director of a brokerage firm; and Ruth Scharf, a retired businesswoman; all of whom were limited partners in the two limited partnerships, New British and New Yorktown. New British and New Yorktown also consisted of 15 other limited partners associated with Sam Sonnenschine (the Sonnenschine Group). New British and New Yorktown owned income producing properties in Durham, North Carolina encumbered by what are called wraparound

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[2] The two bankruptcy cases will be referred to as the Tudor bankruptcy and the AJ bankruptcy throughout this opinion.

promissory notes and deeds of trust (wrap notes).[3] The Independent Limited Partners invested in New British and New Yorktown to receive tax benefits.[4] The underlying problem in this case involves the wrap notes and an option to purchase those wrap notes.

Tudor filed its petition for Chapter 12 bankruptcy in 1977. In the course of the Tudor bankruptcy, AJ, the servicer of the wrap notes, acquired one half of the cash net flow from the wrap notes.[5] At the time it acquired the wrap notes, AJ had not filed its petition in bankruptcy. By 1988, Tudor owned the other half of the interest in the wrap notes after various transactions. In 1993, Tudor and the owners[6] of the income producing properties won separate judgments in excess of ten million dollars against AJ, Robert Jacobs, and Elliott Jacobs based on AJ's fraud and mismanagement in the servicing of the wrap notes. Following the entry of those judgments against it, AJ filed for Chapter 11 bankruptcy protection. Both the Tudor bankruptcy and the AJ bankruptcy were pending before the same bankruptcy judge in the Eastern District of North Carolina.

In September 1996, after three years of negotiations, all of the interested parties in the AJ bankruptcy entered into

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[3] The mortgages were called "wrap note" mortgages because they required payments to be made to a lender who, in turn, paid the holder of the first mortgage. The "last lender wraps around the original debt," according to one of the bankruptcy Trustees.

[4] According to the Independent Limited Partners, if the wrap notes were paid off or foreclosed upon, or if they matured as scheduled, the Independent Limited Partners would suffer recapture of the original tax advantage, which is not otherwise explained.

[5] Prior to the confirmation of AJ's plan in bankruptcy, the Jacobs Group defendants controlled AJ.

[6] The Limited Partners defendants were limited partners in New British Woods and New Yorktown, along with other limited partners who are not defendants in this present case.

a global settlement (the Confirmation Plan). The compromise addressed the interests of AJ, Robert Jacobs, Elliott Jacobs, the E.J. companies, the Sonnenschine Group, Tudor, Allan Mirwis, Tenzer Greenblatt, LLP (Tenzer), New British, and New Yorktown. Tenzer had a claim against AJ for one and a half million dollars arising out of the lawsuits against AJ for fraud and mismanagement. According to one of the terms in the AJ Confirmation Plan, Tenzer agreed to take $700,000 in settlement (the Settlement Amount) of its claim against AJ. The Settlement Amount was to be paid to Tenzer out of funds provided from the proceeds of refinancing the properties or sale of the wrap notes. Under the Confirmation Plan, AJ would assign its one-half interest in the wrap notes to Tudor in exchange for Tudor's and its general and limited partners' release of all suits, causes of action, debts, sums of money, or demands against AJ and the Jacobs Group.[7] The Confirmation Plan required Tudor to "make a good-faith effort" to effectuate the refinancing of the wrap notes by the end of 1996. The part of the Confirmation Plan that eventually led to the instant controversy was the provision which stated:

> Tudor shall grant to the Sonnenschine Group an option to purchase the wrap notes in accordance with the terms and conditions as set forth in the Settlement Terms Letters attached hereto as Exhibit C and Exhibit D, and all such terms and conditions are incorporated herein.[8]

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[7] Tudor had obtained a judgment against AJ and the Jacobs Group for more than $9.7 million. By assigning its interest in the wrap notes, AJ satisfied Tudor's claim against it and the Jacobs Group.

[8] Apparently, this term of the Confirmation Plan was added because Tenzer threatened to proceed against New British and New Yorktown with an involuntary bankruptcy proceeding in New York because AJ owed Tenzer money for legal fees.

Exhibit C stated that the option could be granted to the designee of Sonnenschine; that upon exercise, the option shall transfer all right and title in the properties on or before December 15, 1996; that the Sonnenschine Group would deposit $250,000 with the Tudor Trustee in escrow within ten days after Judge Leonard signed the confirmation; that the closing date could be initially extended to January 1997 by the Tudor Trustee, and if not so extended the option would expire on December 15, 1997; and that the option may be extended to March 31, 1997 upon release of the $250,000 deposit and upon payment of one million dollars by Sonnenschine or its designee. New Horizon was named as the designee for the Sonnenschine Group.

The Confirmation Plan was "unanimously accepted by all voting creditors and equity security holders of [AJ], including all general unsecured creditors, the Partnerships, by and through their general partner, together with the assent and acquiescence of the Sonnenschine Group, Tudor Associates . . ., and the equity security holders." No other parties came forth at that hearing to reject the Confirmation Plan; however, Gerald Cohen, the attorney for certain of the Independent Limited Partners, did not attend the confirmation hearing. These limited partners were deemed to have accepted the Confirmation Plan via the general partner's acceptance of it. The bankruptcy court confirmed the Confirmation Plan on September 26, 1996.

On October 7, 1996, Cohen filed a notice of appeal of the September 26, 1996 AJ Confirmation Plan, alleging that the approved payment of funds to Tenzer could have been available for distribution to the Independent Limited Partners. He voluntarily withdrew that appeal on October 18, 1996. By the end of October 1996, the judgments against AJ and the Jacobs Group were vacated in accordance with the Confirmation Plan.

Also on October 7, 1996, New Horizon sent a letter to the Tudor Trustee informing him that the required $250,000 deposit was being held in an escrow account

opened by New Horizon's attorney and could be transferred to the Tudor Trustee when the option agreement was made final. Whether the Tudor Trustee had previously consented to leaving the deposit money in New Horizon's attorney's account is not shown. New Horizon proceeded to negotiate for financing in order to exercise the option according to the Confirmation Plan's terms. The Tudor Trustee and New Horizon continued to work out the specific terms of the option agreement and reached an agreement, after which the Tudor Trustee sought approval from the bankruptcy court in the Tudor bankruptcy.[9] On November 19, 1996, Cohen wrote a letter to the bankruptcy court objecting to the option agreement terms. The bankruptcy court did not consider this letter during the November 26, 1996 hearing on the approval of the option agreement because Cohen had sent the letter C.O.D., the bankruptcy court clerk refused to pay the charge, and Cohen did not attend the approval hearing. After the hearing, the bankruptcy court approved the option agreement in its entirety and found that it conformed with the Confirmation Plan.[10] On December 6, 1996, Cohen, on behalf of the Independent Limited Partners, filed another notice of appeal in the bankruptcy court contesting the November 26, 1996 order approving he option agreement between the Tudor Trustee and New Horizon. In a letter to the Independent Limited Partners, Cohen wrote that Sonnenschine had a troublesome record and that any money Sonnenschine paid to extend the option would be money that

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[9] The option agreement stated that if the option was exercised in accordance with the agreement's terms, the purchase price shall be the sum of: 1) the net $12,250,000 paid to Tudor, 2) payment of all sums necessary at closing to satisfy all existing liens senior to the mortgages, and 3) payment of $1,000,000 to the partnerships designated for payment to their law firms (Tenzer) as set forth in the AJ Confirmation Plan.

[10] The general partner of New British Woods and New Yorktown agreed to the option agreement. Cohen represented seven limited partners of New British Woods and New Yorktown.

could have been distributed to the Independent Limited Partners.

The terms of the option agreement imposed time constraints on New Horizon to exercise the option and close the purchase. On December 11, 1996, New Horizon paid the deposit, which had been with its attorney (perhaps in escrow), converting the option into a contract of sale. New Horizon could not, however, obtain financing for the purchase price of the wrap notes by the stipulated closing date. The Tudor Trustee extended the closing date at New Horizon's request to January 15, 1997, but informed New Horizon that to extend the date further, New Horizon would have to pay an additional one million dollar deposit by December 20, 1996. New Horizon did not make the additional deposit. On January 16, 1997, the district court dismissed the appeal filed by Cohen because the Independent Limited Partners did not designate items to be included on appeal or provide a statement of the issues to be presented within 10 days of filing its notice of appeal. The Independent Limited Partners had moved for an enlargement of time to designate the issues of appeal; however, the Tudor Trustee countered that motion by claiming that great prejudice would ensue to the Tudor estate by holding up the sale of the wrap notes.[11]

On January 14, 1997, New Horizon made a motion for enlargement of time to exercise the option and for other relief (motion for enlargement) instead of paying the additional one million dollar deposit to Tudor to extend the

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[11] A December 30, 1996 filing indicated that the Independent Limited Partners objected to the option agreement because they alleged that it was materially different from the terms in the Confirmation Plan and that Sonnenschine had forfeited the rights to the option by not complying with the option terms. This was a similar position to that taken earlier by Mirwis at the hearing on approval of the option agreement. We express no opinion on the effectiveness of these matters as a defense to the claim of contempt of court for taking a bad faith appeal.

option until March 1997 as provided in the option agreement and the Confirmation Plan. In its motion for enlargement, New Horizon objected to the December 6, 1996 appeal filed by Cohen. New Horizon contended that: 1) Cohen's clients, the Independent Limited Partners, as well as the Jacobs Group, had no standing to file the December 6, 1996 appeal; 2) Cohen filed the appeal in bad faith, for purposes of harassment or delay, and with intentional and willful disregard of the September 26, 1996 AJ Confirmation Plan; 3) the appeal tortiously interfered with the contractual rights of New Horizon and denied the full consummation of the AJ Confirmation Plan; and 4) even if the appeal was dismissed, a threat of on-going litigation harmed New Horizon and the AJ Confirmation Plan. Along with the motion for enlargement, New Horizon moved for an order to show cause as to why certain parties, including these defendants, should not be held in contempt of court and for injunctive relief (motion to show cause). In its motion to show cause, New Horizon alleged that the Independent Limited Partners and the Jacobs Group had violated the Confirmation Plan in civil contempt of the bankruptcy court's orders.

On February 3, 1997, the bankruptcy court held a hearing on New Horizon's motions. At the hearing, Judge Leonard stated that the option had expired and that the Tudor Trustee was free to deal with whomever he chose to find another buyer for the wrap notes. On February 6, 1997, the bankruptcy court entered its orders denying New Horizon its requested relief. New Horizon did not appeal these bankruptcy court orders to the district court.

Instead of appealing the bankruptcy court's orders, on February 25, 1997, New Horizon filed the complaint in the case at hand in the district court commencing this civil action. In its complaint, New Horizon sought compensatory and punitive damages and requested a jury trial.[12] New

[12] On February 20, 1998, New Horizon amended its complaint and added two more state law claims--tortious abuse of process and malicious prosecution.

Horizon based its lawsuit on the contention that the defendants were bound by the Confirmation Plan and received benefits from it; however, the defendants "engaged in a conspiracy to thwart consummation" of the option agreement by filing appeals and objections in the Tudor bankruptcy and by making contacts with the lender from whom New Horizon sought financing for the wrap notes sale and the general partner of New British and New Yorktown, all in an attempt to make the option fail.

On June 20, 1997, the district court entered an order in this case finding that the "substance of this matter is related to cases having arisen under Title 11" and referred it to the bankruptcy court. The bankruptcy court heard and determined an abundance of motions between June 1997 and October 1998. [13] After the bankruptcy court denied both parties' motions for summary judgment on October 22, 1998, the district court set a trial date. On November 3, 1998, the trial began in the district court.[14] The parties presented evidence to the jury on all of New Horizon's claims except the civil contempt of court claim. The district judge determined that he would decide the contempt matter and hear the testimony relating to it during the jury's deliberations. The jury returned its verdict in favor of New Horizon on November 25, 1998. The district court entered its

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[13] On August 5, 1997, Judge Leonard determined that his previous order of February 6, 1997 was not an adjudication of the contempt issue as against the defendants in this action. In fact the order of February 6, 1997 was brief and to the point. It described the matter as a "Motion to show cause [why a contempt action should not follow] and for injunctive relief." The action taken by the bankruptcy court was "this motion is denied." See footnote 20, infra.

[14] On October 23, 1998, the Jacobs Group defendants filed a motion to dismiss the entire action for lack of subject matter jurisdiction. Later, New Horizon filed a response in opposition to this motion and made a motion for sanctions against the Jacobs Group defendants for filing their motion.

order regarding the contempt matter and other post trial motions on July 19, 1999.[15] The Jacobs Group defendants and the Independent Limited Partners defendants appeal the final judgment entered on July 19, 1999 and amended on July 26, 1999. New Horizon did not appeal the denial of its civil contempt of court claim.

II.

While there are various issues raised on appeal, we must first consider the defendants' contention that the district court lacked subject matter jurisdiction over this case. Lack of subject matter jurisdiction may be raised at any time by the parties or the court. See Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701-02 (1982); United States v. White, 139 F.3d 998, 999-1000 (4th Cir. 1998). The district court determined that this case was related to cases arising under title 11. We review its determination of subject matter jurisdiction de novo. See Folio v. City of Clarksburg, 134 F.3d 1211, 1214 (4th Cir. 1998).

To repeat, on February 6, 1997, before the case before us was filed, the bankruptcy court entered two orders in response to New Horizon's motion for enlargement of time

[15] The district court denied New Horizon's claim for civil contempt; motions for sanctions against the Jacobs Group defendants for filing a motion to dismiss for lack of subject matter jurisdiction; motions to strike and for sanctions against the Jacobs Group defendants relating to the defendants' late filing of two motions in limine; renewed motion for summary judgment; amended trial memorandum and proposed jury instructions; motions for sanctions regarding the failure of certain defendants to respond to interrogatories and requests for production of net worth; and motion for fees and costs relating to the supplemental proffer. The court also denied defendants' motion for judgment as a matter of law. The court granted New Horizon's motion for sanctions against the Jacobs Group for failure to respond to certain discovery requests and allowed attorneys' fees related to those sanctions.

and its motion to show cause. After a hearing and argument from New Horizon, the Tudor Trustee and the Independent Limited Partners, the bankruptcy court denied both of New Horizon's motions and entered its orders. New Horizon did not appeal these two adverse rulings to the district court, rather, it waited until after the time for filing an appeal had expired and then chose to file this entirely separate civil action against the Jacobs Group and the Independent Limited Partners based on the same factual scenario, but requesting money damages rather than injunctive relief.

In its complaint in the present case filed on February 25, 1997, New Horizon alleged jurisdiction under 28 U.S.C. § 1334 because it believed that this case was related to proceedings under title 11 of the United States Code. Section 1334(b) provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). When Congress enacted § 1334, it "was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy." In re Wood, 825 F.2d 90, 92 (5th Cir. 1987) (citing S. Rep. No. 989, 95th Cong., 2d Sess., 153-54 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5939-40) (emphasis added).

New Horizon sought to invoke federal jurisdiction over claims it alleged were related to the AJ bankruptcy or the Tudor bankruptcy, either or both. Related to jurisdiction,

however, has a special meaning in the law,[16] and we must turn to the test approved by the Supreme Court in Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995), in determining whether the district court had subject matter jurisdiction in this case.[17] As the Court stated in Celotex, the "'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate;" however, "'related to' jurisdiction cannot be limitless." Celotex, 514 U.S. at 308 (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)) (internal quotations omitted), and Board of Governors, FRS v. MCorp Financial Inc., 502 U.S. 32, 40 (1991) (Congress has vested limited authority in bankruptcy courts). See also In re Dow Corning Corp., 86 F.3d 482, 489 (6th Cir. 1996); In re Wood, 825 F.2d at 93 (stating that "the definition of [related to jurisdiction] of the Court of Appeals for the Third Circuit [Pacor] appears to have the most support"). A civil case filed in a district court is related to a case in bankruptcy if the outcome in the civil case "could conceivably have any effect on the estate being administered in bankruptcy . . . if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." Celotex, 514 U.S. at 308, n.6 (quoting Pacor, 743 F.2d at 994) (internal quotations omitted) (italics in Pacor).

This court has adopted the Pacor related to test and has held that a district court, "and derivatively the Bankruptcy court" has jurisdiction over an action related to a

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[16] Related to jurisdiction does not mean that the case is related in the ordinary sense of the word "related." Webster's defines "related" as "connected or associated." Webster's II New Riverside University Dictionary 992 (1988).

[17] Other federal question jurisdiction or diversity of citizenship is not claimed in this case.

bankruptcy case "if the outcome [of the proceeding] could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and [the proceeding] in any way impacts upon the handling and administration of the bankrupt estate." Spartan Mills v. Bank of Am. Ill., 112 F.3d 1251, 1255-56 (4th Cir.), cert. denied, 522 U.S. 969 (1997) (quoting Pacor, 743 F.2d at 994 (internal quotation marks omitted)). The Supreme Court gave the following as an example of a civil case related to a bankruptcy case: "suits between third parties which have an effect on the bankruptcy estate." Celotex, 514 U.S. at 307 n.5 (citing 1 Collier on Bankruptcy ¶ 3.01[1][c][iv] at 3-28 (15th ed. 1994)). Notably, as is the case here, a related to case need not necessarily be against the debtor or his property. Nevertheless, the "mere fact that there may be common issues of fact between a civil proceeding and a controversy involving a bankruptcy estate does not bring the matter within the scope of [1334(b)]." Pacor, 743 F.2d at 994.[18] In this circuit, a civil case is related to bankruptcy if "the outcome of[the civil] proceeding could conceivably have any effect on the estate being administered in bankruptcy." In re Celotex Corp., 124 F.3d 619, 625 (4th Cir. 1997) (citing Pacor, 743 F.2d at 994),[19] see also A. H. Robins Co. v. Piccinin, 788 F.2d 994, 1002 n.11 (4th Cir. 1986).

A.

New Horizon argues that the case at hand is related to other cases under title 11, and the district court referred the case to the bankruptcy court on those grounds. It argues that

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[18] The Pacor test has been adopted by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits and the Supreme Court cited it with approval in Celotex. See Dow Corning, 86 F.3d at 489 (listing the circuits). See also Celotex, 514 U.S. at 308 n.6.

[19] Celotex in the Fourth Circuit is a different case than the Supreme Court's Celotex referred to throughout this opinion.

its civil contempt claim saves the day jurisdiction-wise: "[New] Horizon's contention below that the Defendants acted in contempt of the Confirmation Order." Thus, New Horizon rests all of its claims asserted here on the jurisdictional basis of the civil contempt of court claim. New Horizon asserts that "[t]he very integrity of the orders of a federal court is at issue here" because the contempt claim involves the alleged behavior of the defendants in contempt of the bankruptcy court's order confirming the AJ plan. According to New Horizon, if the district court had ruled in its favor on the contempt issue, "one of the conceivable remedies the court might have granted was to undo part or all of the [AJ] Confirmation Plan."

The argument goes that the contempt claim and the relief that could have been accorded to New Horizon on that claim would have had an effect on the estate being administered in bankruptcy. This potential effect on the bankruptcy estate, it continues, would then give the district court related to jurisdiction.

It is true that the integrity of the orders of a federal court are at issue here, but the record requires a result opposite to that advocated by New Horizon.

The problem with the reasoning of New Horizon is that it ignores the fact that the order of the bankruptcy court of February 6, 1997 was a final order because it was not appealed from on or before 10 days thereafter pursuant to 28 U.S.C. § 158(a) and § 158(c) and Rule 8002 of the Bankruptcy Rules. See also Bankruptcy Rule 9020 and In re Walters, 868 F.2d 665 (4th Cir. 1989). Thus, the claim in the complaint in this case that jurisdiction is established under 28 U.S.C. § 1334(b) as a related to case under Title 11 because of its claim that the defendants were guilty of civil contempt of the Bankruptcy Court depends for its success on a collateral attack on a final order of the bankruptcy court, which two opinions of the United States Supreme Court, Celotex Corp. v. Edwards, 514 U.S. 300 (1995), and Oriel v. Russell, 278 U.S. 358 (1929), have decided is not

permissible. We are of opinion that the jurisdictional base for this case should not be permitted to stand on a collateral attack which has been forbidden by two decisions of the Supreme Court.

The hearing on February 3, 1997 was the result of a motion filed in the Bankruptcy Court and dated January 14, 1997, seeking to hold the defendants in the present case:

> in civil or criminal contempt of prior orders of . .. [the bankruptcy court].

The "prior orders" of the bankruptcy court refer to the order of confirmation of the AJ plan with its associated terms, and the January 14th motion also asked for injunctive relief. On February 3, 1997, the court heard the motion for contempt and on February 6, 1997 entered the following order:

> This confirmed Chapter 11 case is before the court on a motion to show cause [why the defendants should not be cited for contempt] and for injunctive relief filed by New Horizon of NY, L.L.C. A hearing was held on February 3, 1997 in Raleigh, NC. For the reasons stated in open court, this motion is denied.
>
> So Ordered.

Although all of the parties were present in that proceeding so that the bankruptcy court could have given complete relief, such relief was denied and New Horizon did not appeal the denial of relief. Rather, it let the time for appealing expire and on February 25, 1997, some 19 days later, it filed its complaint in the case at hand. In that complaint was Count 3 "Civil Contempt of Court," the pertinent part of which is quoted in full as follows:

> The actions of each and every defendant, as described hereinabove, constitutes contempt of the United States Bankruptcy Court through the knowing, willful, and contumacious violation of the order of the Honorable J. Rich Leonard dated September 26, 1996 confirming AJ and AJ's plan of reorganization and the terms of the settlement.

Thus, it is patent that the civil contempt count, on which New Horizon bases its claim in this case of related to jurisdiction under § 1334, is nothing more nor less than a collateral attack on the order of the bankruptcy court of February 6, 1997. "Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument." Murdaugh Volkswagen v. First National Bank of SC, 741 F.2d 41, 44 (4th Cir. 1984).[20]

In Celotex Corp., 514 U.S. 300, the bankruptcy court for the Middle District of Florida issued an injunction prohibiting judgment creditors from executing on a supersedeas bond without the bankruptcy court's permission. Edwards was a judgment creditor and, despite the order of

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[20] On August 5, 1997, some six months later and more than five months after the filing of the case at hand, Judge Leonard referred to his February 6, 1997 order: "In this situation, the court has the luxury of hindsight. The primary issue at the [February] hearing was whether the court should grant the injunctive relief requested. The court denied this request, finding that the alleged misconduct was simply irrelevant to [New Horizon's] entitlement to the relief then sought. Having denied the injunctive relief, the court never considered the allegations underlying the contempt motion and did not adjudicate it. It follows that the court's February 6, 1997 order is not res judicata as to the present action."

The luxury of hindsight, however, is not a luxury afforded to a United States District Court, and thus not to a bankruptcy court. Lewis v. Tobacco Workers Int'l Union, 577 F.2d 1135, 1139 (4th Cir. 1978) (holding that an order appealed from may not be changed during a pending appeal). Thus the final order here was not subject to change.

the bankruptcy court enjoining the collection of the supersedeas bond, a Texas district court permitted Edwards to proceed on the bond, although the bankruptcy court's injunction had not been modified. The holding of the district court was that the earlier injunction of the bankruptcy court was erroneous although it had not been modified or reversed. That decision was affirmed by the Fifth Circuit, but the Supreme Court reversed, holding that "it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." 514 U.S. 300, 313. The Court further stated that the judgment creditor

> [i]f dissatisfied with the Bankruptcy Court's ultimate decision, . . . [could] appeal "to the district court for the judicial district in which the bankruptcy judge is serving," see 28 U.S.C. § 158(a), and then to the Court of Appeals for the Eleventh Circuit, see § 158(d). Respondents chose not to pursue this course of action, but instead chose to collaterally attack the Bankruptcy Court's Section 105 Injunction in the federal courts in Texas. This they cannot be permitted to do without seriously undercutting the orderly process of the law. (Italics added).

514 U.S. 300, 313. The Celotex Court relied on and followed its decision in Oriel v. Russell, 278 U.S. 358 (1929). That case, like the one at hand, concerned contempt citations. Contempt orders for violations of turnover orders had been entered by the district court and affirmed by the court of appeals following decision by the referee in bankruptcy to turn over the books and property in question from which no appeals were taken. On a motion to commit the bankrupts to jail, one attempted to introduce evidence on the issue of

whether or not at the time of the turnover order he had the books in question in his possession or under his control, and the other attempted to show omitted evidence in the turnover proceeding. Both the referee and the district court refused to re-try those issues on the ground that the turnover orders should not be collaterally attacked. The Court affirmed the court of appeals and stated that the orders of contempt are entered by a bankruptcy court with ". . . the understanding that it is rendering a judgment which is only to be set aside on appeal or some other form of review, or upon a properly supported petition for rehearing in the same court." 278 U.S. 358, 364.

Our circuit followed the holdings in Celotex and Oriel in Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997). In that case, a Florida bankruptcy court had ordered the sale of property in the possession of the bankrupt notwithstanding the fact that there were conflicting liens claimed against the property and the order of sale of the property provided that the liens would be preserved against the fund. A later order of the bankruptcy court approved the sale of the property and established finally the order of liens against the fund. This order was not appealed from although Spartan Mills was a party to that proceeding. Later, Spartan Mills filed an action in the district court seeking a declaratory judgment that its lien was superior to the liens established by the bankruptcy court. The district court declined to grant relief because it held that "Spartan's action constitutes an improper collateral attack on the sale order issued by the United States Bankruptcy Court." 112 F.3d at 1254. We affirmed, relying on Celotex and Oriel. We reasoned that "a challenge for error may be directed to the ordering court or a higher court, as rules provide, but it may not be made collaterally unless it is based on the original court's lack of jurisdiction." 112 F.3d at 1255. In accord is Lindsey v. Ipock, 732 F.2d 619, 622 (8th Cir. 1984), holding that a lien claimant might not collaterally attack a bankruptcy court's order of sale in "collateral proceedings."

Celotex and Oriel have not been overruled, watered down, or questioned, by the Supreme Court, and our circuit precedent is entirely in accord with those cases. Thus, we conclude that the related to jurisdiction claimed by New Horizon is not to be supported by a collateral attack on an order of the bankruptcy court, which attack is quite contrary to Supreme Court and our own circuit precedent.

B.

We now examine whether New Horizon's other claims made in their complaint under state law are related to a bankruptcy case so as to provide subject matter jurisdiction under § 1334(b). During oral argument, counsel for New Horizon conceded that "this case is based on an [allegedly] frivolous or bad faith appeal from an order of the bankruptcy court as a matter of state law."

In consideration of this question, we are reminded that the standard for related to jurisdiction under § 1334 is from Pacor, 743 F.2d 984, as set out in Celotex, 514 U.S. 300, 308 n.6, as follows:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy [under§ 1334] is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.
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> (Emphasis in original).

The defendants argue that the state law claims brought by New Horizon, tortious interference with a contract, breach of contract, malicious prosecution, abuse of process, and unfair and deceptive trade practices, do not alter AJ's or Tudor's rights or liabilities or impact the handling or administration of the AJ bankruptcy or the Tudor bankruptcy.

The following facts are uncontradicted: New Horizon is not a debtor or a creditor in either the AJ or Tudor bankruptcy, rather it is an entity created for the purpose of acquiring, post-confirmation, an interest in an asset; neither the AJ nor the Tudor bankrupt estate is a party to this action; the defendants are not debtors in either bankruptcy nor are they bankruptcy creditors; and New Horizon is not seeking to have the court enforce or implement any order touching upon a bankrupt estate.

In its complaint, New Horizon requested that the district court award compensatory and punitive damages against these defendants s relief for its claims rather than relief regarding the Confirmation Plan, the expired option, or the wrap notes. The bankruptcy court made its final order on February 6, 1997 regarding the Tudor Trustee's right and ability to sell the wrap notes to whomsoever the Trustee chose. New Horizon's option to buy the wrap notes was deemed to be expired and was not revived, and New Horizon also failed to appeal that judgment. Instead, New Horizon now prays for damages, all of which are against these defendants and are completely unrelated to the sale of the wrap notes or the administration of the bankruptcy estates. Any damages paid by the Jacobs Group defendants or the Independent Limited Partners defendants would come out-of-pocket from those defendants, none of whom were debtors or creditors in either bankruptcy and would have no effect on either bankrupt estate. Any recovery would not inure a benefit to the AJ bankrupt estate or the Tudor bankrupt estate, and an order or judgment in this case would not modify or affect either estate. In fact, the wrap notes

were sold to another purchaser in September 1997, pursuant to the bankruptcy court's unappealed order, for a higher purchase price,[21] and the AJ estate was settled months before, and unaffected by the trial in this case. Based on the facts we have mentioned, we find that the resolution of the claims in the case at hand could have no conceivable effect on the AJ and Tudor bankruptcy estates, and therefore, this case is not related to the AJ bankruptcy case nor the Tudor bankruptcy case within the meaning of 28 U.S.C. § 1334.

C.

New Horizon's other arguments in support of related to jurisdiction fail as well. New Horizon asserts that the bankruptcy court retained jurisdiction over the Confirmed Plan with AJ bankruptcy, and therefore, it should have jurisdiction in this case. The plan cannot confer jurisdiction upon a bankruptcy court or a federal district court, see 8 Collier on Bankruptcy ¶ 1142.04[1], rather 28 U.S.C. § 1334 governs jurisdiction. And, in all events, nothing about this case, nor the result thereof, has or may have any conceivable effect on either the AJ or Tudor bankrupt estates, nor does it alter the debtors rights, liabilities, options, or freedom of action (either positively or negatively) or in any way impacts upon the handling and administration of either bankrupt estate. Celotex, 514 U.S. 300, 308, n.6.

III.

Because resolution of this action for or against these defendants could not affect the bankrupt estates or the debtors in any way pursuant to the Pacor rules as adopted by the Court in Celotex and by this court in Robins and Spartan Mills and our own Celotex, we hold that the district court did

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[21] If anything, the Tudor estate benefitted from the subsequent sale to another purchaser. But that was not affected by the result in the case at hand.

not have related to jurisdiction under 28 U.S.C. § 1334 in this case. We especially note that we express no opinion on the merits of the state law claims asserted in this case.

Accordingly, the judgment of the district court appealed from is vacated and the case is remanded to the district court for dismissal without prejudice for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-126-BR

FILED
JUL 19 1999
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E.DIST.N.CAROLINA

NEW HORIZON OF NY, LLC.

Plaintiff,

v.

ROBERT JACOBS; ALAN JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. PROPERTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; STANLEY LANE; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; PETER DAPUZZO; HOWARD ROSEN; and RUTH SCHARF,

Defendants.

ORDER

Entered: July 19, 1999

This matter is before the court on the following: (1) plaintiff's claim for civil contempt of court; (2) plaintiff's claim for trebling of the jury's unfair trade practice verdict; (3) plaintiff's motion for sanctions against the Jacobs Group defendants for filing the motion to dismiss for lack of subject

matter jurisdiction; (4) plaintiff's motion to strike and for sanctions against the Jacobs Group defendants relating to defendants' late filing of two motions in limine, renewed motion for summary judgment, amended trial memorandum and proposed jury instructions; (5) plaintiff's motion for sanctions regarding defendants' failure to respond to interrogatories and requests for production on the issue of defendants' net worth; (6) plaintiff's motion for attorney's fees and non-taxable litigation costs;[1] (7) Jacobs Group defendants' motions for judgment as a matter of law, for a new trial and to alter or amend judgment; (8) defendants Lane, Scharf, Rosen and Dapuzzo's motion for judgment as a matter of law and for a new trial; (9) defendants Lane, Scharf, Rosen and Dapuzzo's motion for expenses and costs pursuant to Fed. R. Civ. P. 37; (10) Jacobs Group defendants' supplemental proffer of evidence; and, (11) plaintiff's motion to strike the supplemental proffer of evidence. All of these matters are ripe for decision.

I. BACKGROUND

The facts and procedural background of this case are lengthy and intricate. They will not and need not be recounted in full herein. However, a brief explanation of the most recent proceedings is necessary for an understanding of the disposition of the matters at bar. Other facts which may be necessary to the disposition of any one of the matters enumerated above may be explained when that matter is discussed.

The trial of this case began on 2 November 1998 with a hearing on several dispositive and evidentiary motions. A jury was selected and impaneled on 3 November 1998, and the presentation of evidence continued from that date until

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[1] By order dated 21 January 1999, the court deferred briefing and consideration of plaintiff's application for fees and costs until 10 days after the court's ruling on the issues addressed in this order. Plaintiff's motion for a bill of costs will be decided by the Clerk of Court.

24 November 1998. On 24 November 2998, as the jury deliberated, the court conducted a bench trial on plaintiff's claim for civil contempt of court. The jury returned a verdict on 25 November 1998 in which plaintiff was awarded in excess of six million dollars in compensatory and punitive damages. As part of this verdict, the jury found that at least some of the defendants engaged in conduct specified in the special interrogatories regarding unfair and deceptive trade practices. Following the entry of the jury's verdict, the court instructed the parties to brief the issues of civil contempt and trebling the jury award regarding unfair and deceptive trade practices. This briefing is complete, all matters are ripe for decision, and each will be addressed herein.

II. DISCUSSION

A. Plaintiff's Claim for Civil Contempt of Court

On 26 September 1996, the Bankruptcy Court entered the Order Confirming Plan of AJ & AJ Servicing Inc. (Order Confirming Plan). Plaintiff argues that all defendants should be held in civil contempt based on their deliberate "efforts to sabotage elements of the Confirmed Plan" to which none of them objected. (Pl.'s 26 Oct. 1998 Mem. of Auth. at 29.) The Order Confirming Plan provided, among other things, that

> Tudor shall grant to the Sonnenschine Group an option to purchase the Wrap Notes in accordance with the terms and conditions as set forth [in] the Settlement Terms Letters attached hereto as Exhibit C and Exhibit D, and all of such terms and conditions are incorporated herein.

(Order Confirming Plan at 5, ¶ 3.) The Jacobs Group defendants consented to the order through their attorney, and the general partner of the partnership signed the order on behalf of the other defendants. (Pl.'s 26 Oct. 1998 Mem. of Auth. at 30.)

On 26 November 1996, an order was entered in the Tudor bankruptcy entitled "Order Approving Option Agreement, Private Sale of Notes and Mortgages and Placement of Net Sale Proceeds in Escrow" (hereinafter November 26 Order). In the 26 November Order, the bankruptcy court set out the terms under which the option awarded in the September 26 Order Confirming Plan should be extended. Defendants, through their attorney, Gerald Cohen, appealed the November 26 Order.

Plaintiff argues that defendants violated the option provision of the September 26 Order through "their efforts to prevent the Sonnenschine designee[,New Horizons,] from closing on the options transaction." (26 October 1998 Pl.'s Mem. of Auth. at 30.) Citing In re Krypton Broadcasting of Ft. Pierce, Inc., 181 B.R. 657 (Bankr. S.D. Fla. 1995) and Rhode Island Hosp. Trust National Bank v. Howard Communications Corp., 980 F.2d 823, 829 (1st Cir. 1992), plaintiff argues that efforts to prevent the implementation of portions of a confirmed plan have been held to constitute contempt of an order confirming a plan of reorganization.

Among other things, plaintiff suggest that the defendants tried to prevent the sale by appealing the November 26 Order and that such an appeal constituted an impermissible collateral attack on the September 26 Order by which they were bound. (26 October 1998 Pl.'s Mem. of Auth. at 32.) In essence, plaintiff contends that the defendants consented to the September 26 Order even though they were opposed to it in order to obtain the various benefits for themselves under the Order Confirming Plan and that they set about attacking the Plan collaterally in order to prevent plaintiff from purchasing the wrap notes. (26

October 1998 Pl.'s Mem. of Auth. at 35.) For these reasons, plaintiff believes defendants should be sanctioned.

> To establish civil contempt [complainant] must prove: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) a showing that the decree was in the movant's "favor"; (3) a showing that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) a showing that movant suffered harm as a result.

Colonial Williamsburg Foundation v. Kittinger Company, 792 F. Supp. 1397, 1405-06 (E.D. Va. 1992) aff'd, 38 F.3d 133, 136 (4th Cir. 1994); Omega World Travel, Inc. v. Omega Travel Inc., 710 F. Supp. 169, 170 (E.D. Va. 1989), aff'd, 905 F.2d 1530 (4th Cir. 1990). The complainant must show civil contempt by clear and convincing evidence. Colonial, 792 F. Supp. at 1406; and In re General Motors, Corp., 61 F.3d 256, 258 (4th Cir. 1995), opinion after remand, 110 F.3d 1003 (1997) cert. denied, 118 S. Ct. 61 (1997). Willfulness is not an element of civil contempt. General Motors, 61 F.3d at 258.

As plaintiff recognizes, to make out an action for civil contempt, plaintiff must show, among other things, that defendant violated a specific and definite order. In re General Motors, 61 F.3d 256, 258 (4th Cir. 1995). The Fourth Circuit has explained that "[c]ivil contempt is an appropriate sanction if we can point to an order of this Court which 'set[s] forth in specific detail an unequivocal command' which a party has violated." Id. (citing Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir. 1986)). See also United States v. Cutler, 58 F.3d 825, 834 (2nd Cir. 1995) (same); D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 460

(7th Cir. 1993) ("party can only be held in contempt for behavior clearly prohibited by a court order 'within its four corners.'" (citations omitted)); Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991) ("civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous"); Koehler v. Grant, 213 B.R. 567, 570 (8th Cir. BAP 1997) (same). The existence of a clear and unequivocal order is therefore essential to a finding of contempt. The 26 September Order Confirming Plan does not unequivocally prohibit defendants from appealing its terms, nor does it clearly and unequivocally prevent them from appealing an related order in the Tudor bankruptcy.

In the cases relied on by plaintiff, the orders violated were highly specific, prohibiting enumerated actions or requiring certain actions. In Krypton Broadcasting, for example, the order confirming the plan of reorganization specifically required that the officers and directors of the debtor corporations to sign the FCC applications necessary for the transfer of broadcast licenses, to supplement the applications as necessary, and to "support approval of" those applications. Krypton Broadcasting, 181 B.R. at 662. In that case, the debtors' sole director "took action seeking to defeat rather than support the FCC applications." Id. Among other things, he filed with the FCC a petition to deny application for transfer of control of the station, and an informal objection to the application for assignment of licenses to the new owners. Id. The court held that the director's actions in direct contravention of the terms of the order constituted an impermissible collateral attack on the order. In Rhode Island, 980 F.2d at 829, the court of appeals affirmed the district court's finding of contempt where appellant-guarantors had been explicitly enjoined "to cooperate and to 'refrain from ... imped[ing] the receiver in the performance of his duties in any way'" and yet they had taken several actions designed to prevent the receiver from obtaining the FCC's approval of the necessary license transfers. Likewise, in Omega World Travel, a travel agency was held in

contempt because it used the word "Omega" in a Yellow Pages advertisement in a manner expressly prohibited by a consent decree in a trademark infringement action. Omega World Travel, 710 F. Supp. at 170-171. Similarly, in General Motors, despite the court's clear command that specific portions of a certain recusal order were not to be cited as authority, plaintiff's counsel, in the context of a subsequent proceeding in another court, cited and quoted directly from the language of the order that had been stricken. General Motors, 61 F.3d at 259. Finally, in Columbia Gas Transmission Corp. v. Mangione Enterprises of Turf Valley, L.P., 964 F. Supp. 199, 199-200 (D. Md. 1996), the contemnor failed to comply with an injunction requiring it specifically to remove certain permanent structures encroaching upon complainant's right of way adjacent to their natural gas pipelines by a certain date.

Because plaintiff has not shown that defendant violated a specific and definite order, plaintiff has not established civil contempt. Plaintiff does argue persuasively that, after consenting to the confirmed plan and taking advantage of all the benefits to which the plan entitled them, defendants took several actions designed to undermine that plan and to prevent the Sonnenschine Group's designee from being able to close on the option to purchase the wrap notes. The fact that such conduct may be deserving of punitive sanctions, however, does not mean that it satisfies the standard of civil contempt. While a court may award relief to a petitioner and award sanctions designed to punish the contemnor and vindicate the authority of the court in proceedings for *criminal* contempt, see In re E.I. DuPont de Nemours & Company-Benlante Litigation, 99 F.3d 363, 368 (11th Cir. 1996), cert. denied, 118 S. Ct. 263 (1997), *civil* contempt orders are imposed only to compel or coerce obedience to a court order, or to compensate the parties for losses resulting from the contemnor's non-compliance with a court order. General Motors, 61 F.3d at 258. See also Colonial Williamsburg, 792 F. Supp. at 1407; In re Snider

Farms, Inc., 125 B.R. 993, 997 (Bankr. N.D. Ind. 1991)(citing United States v. United States Mine Workers of America, 330 U.S. 258, 303-04 (1947)).

The language of plaintiff cites from Bush Ranch, Inc., v. E.I. du Pont de Numours and Co., 918 F. Supp. 1524 (M.D. Ga. 1995), rev'd, 99 F.3d 363 (11th Cir. 1996), cert. denied, 118 S. Ct. 263 (1997), undermines plaintiff's argument that a finding of civil contempt is appropriate here. In that case, the district court emphasized the fact that DuPont cheated - - consciously, deliberately and with purpose. "DuPont has committed a fraud on this Court, and this Court concludes that DuPont should be, indeed must be, severely sanctioned if the integrity of the Court system is to be preserved." Id. at 1556. First, defendants' intent or purpose in taking the actions they took is irrelevant to a civil contempt inquiry. Secondly, as noted above, a sanction for civil contempt is not awarded to vindicate the authority of the court or to punish the alleged contemnors. Rather, a civil sanction is properly awarded to compensate the complainants or to coerce compliance with a court order. As the Eleventh Circuit noted in its opinion reversing the Bush Ranch decision cited by plaintiff, it had little trouble in concluding "that the sanctions the district court imposed were overwhelmingly punitive - - and thus criminal - - in nature." Bush Ranch, 99 F.3d at 368. "We are persuaded that the sanctions imposed by the district court ... were designed to punish DuPont for flouting the authority of the district court." Id. at 369.

As the Supreme Court explained in International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994), the civil or criminal nature of a contempt proceeding or sanction is properly drawn from an examination of the relief afforded. Bagwell, 512 U.S. at 827-828 ("whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved" and "conclusions about the civil or criminal nature of a contempt sanction are properly drawn ... 'from an examination of the

character of the relief itself'" (citations omitted)). If this court were to attempt to impose contempt sanctions upon defendants based on the flagrancy of their conduct, such sanctions would properly be described as punitive, and therefore criminal, in nature. See General Motors, 61 F.3d at 259. In light of the foregoing principals, even a careful consideration of the egregious nature of defendants' behavior cannot support a finding of civil contempt where the order allegedly violated does not specifically and unequivocally prohibit defendants' conduct.

B. Trebling of the Jury's Unfair Trade Practice Verdict

North Carolina General Statute §75-16 provides, in part, that when any corporation is injured in violation of Chapter 75, "judgment shall be rendered in favor the plaintiff and against the defendant for treble the amount fixed by the verdict." N.C. Gen. Stat. §75-16. In this case, within Issue 8, the jury was presented with several specific interrogatories addressing the conduct of each defendant. The jury responded "yes" to some of these interrogatories and "no" to others. While the activity included in the interrogatories to which the jury responded in the negative will not affect this discussion, the activity included in the interrogatories to which the jurors responded affirmatively must be examined. Specifically, to determine whether plaintiff was injured in violation of Chapter 75, this court must determine if those actions, which the jury determined at least one of the defendants engaged in, was "in or affecting commerce." N.C. Gen. Stat. §75-1.1. Any party claiming exemption from the statute has the burden of proof with respect to that claim. N.C. Gen. Stat. §75-1.1(d). Thus, in this case, the burden is on the defendant to show that their acts were not in or affecting commerce.

"Commerce" includes all business activities, but does not include professional services provided by a member of a

learned profession. Broadly interpreted by North Carolina courts, the term includes interaction between borrower and mortgage broker, Johnson v. Phoenix Mutual Life Insurance Co., 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), overruled on other grounds, Meyers & Chapman Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 569. 374 S.E.2d 385, 392 (1998), as well as the interaction between borrower and lender. Pedwell v. First Union National Bank, 51 N.C. App. 236, 237, 275 S.E.2d 565, 566 (1981). See also, Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (business activities include financial transactions). In this case, the activities which the jury found the defendants to have engaged in as described in the special interrogatories to Issue 8, had a direct effect upon the financing transaction between plaintiff, Patrician and Nationsbank, and prevented plaintiff from securing the financing necessary to exercise its option to purchase the wrap notes. These actions affected commerce and consequently fall within the statutory definition.

Whether certain actions are unfair or deceptive is also a matter of law for the court to determine. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, review denied, 211 N.C. 751, 321 S.E.2d 126 (1984). North Carolina courts have stated that "a practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious . . . ." Johnson, 300 N.C. at 263, 266 S.E.2d at 621. A court must determine whether an action is unfair or deceptive without regard to negligence, bad faith or lack or any intent to deceive. Bernard, 68 N.C. App. at 230-231, 314 S.E.2d at 584; see also, Murray v. Nationwide Mutual Insurance, Co., 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996), review denied, 345 N.C. 344, 483 S.E.2d 172, 173 (1997).

The case of Pedwell v. First Union National Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981) is factually similar to the case at bar. In Pedwell, plaintiff alleged that the

defendant bank contracted to sell a condominium to the plaintiffs; that, after making the contract, the bank decided that it did not want to sell the condominium to the plaintiffs; that the bank then agreed with a third party that the third party would not loan the plaintiffs the funds necessary to finance the purchase of the condominium and that the third party would not notify the plaintiffs of the refusal of the loan until it was too late for the plaintiffs to find alternative financing; and, finally, that the third party refused to loan the money to the plaintiffs, not for a business reason but in order to prevent the plaintiffs from performing under the contract. Id. at 237-238, 275 S.E.2d at 566-567. The North Carolina Court of Appeals held these allegations by plaintiff stated a cause of action under Chapter 75. Specifically, the court wrote: "if the bank entered into the agreement with the [third party] to prevent the plaintiffs from performing this part of the contract and the [third party] did in fact prevent the plaintiffs from so performing, . . . this would be an 'unfair . . . act . . . affecting commerce' under G.S. [§] 75-1.1(a)." Id. at 238, 275 S.E.2d at 567 (citations omitted). In the case at bar, the jury's responses to the special interrogatories of Issue 8 indicate that it believed that at least some of the defendants engaged in conduct similar to the conduct the Pedwell court stated would constitute a violation of Chapter 75. This court specifically finds that the conduct described in each of the interrogatories as to each defendant to which the jury answered "yes" was in or affecting commerce and was unfair or deceptive, and thereby constituted a violation of Chapter 75.

This finding means that, as to those defendants, the amount of the jury's verdict will be trebled as required by N.C. Gen. Stat. §75-16. In accordance with the specific interrogatories, the damage award will be trebled as to the following defendants: Stanley Lane; Howard Rosen; David Queller; David Queller, Inc.; Ira Born; Robert Jacobs; Elliot Jacobs; Allan Mirwis; E.J. Servicing, Inc.; E.J. Realty Management Corp.; and E.J. Property Consultants. The

verdict will not be trebled as to Peter Dapuzzo or Ruth Scharf because, as set forth in the response to the interrogatories within Issue 8, the jury found that neither of these defendants engaged in any of the conduct described.

Plaintiff has argued that the jury's verdict should be trebled as to all defendants, independent of the responses to the interrogatories. Plaintiff claims that the jury's finding of joint and several liability as to all defendants on the causes of action of tortious interference with contract, malicious prosecution, abuse of process, and breach of contract are enough to support a Chapter 75 violation. The court, however, disagrees. In this case, the specific actions of the defendants that violated Chapter 75 were presented to the jury in the form of interrogatories at the request of plaintiff and in compliance with North Carolina Pattern Jury Instructions. In fact, the wording of the seven special interrogatories submitted to the jury was suggested by plaintiff. With the benefit of the jury's verdict specifically directed to the conduct of each defendant, the court believes it is best to rely upon that verdict as a basis for the imposition of Chapter 75 liability and ensuing damages.

Courts have recognized that Chapter 75 liability does not arise in every business dispute. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998); Hageman v. Twin City Chrystler-Plymouth, Inc., 681 F. Supp. 303 (M.D.N.C. 1988). Further, a cause of action under Chapter 75 is a separate and distinct cause of action from one plead as breach of contract or fraud. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, cert denied, 311 N.C. 751, 321 S.E.2d 126 (1984). An action for unfair and deceptive trade practices is not based upon any contractual relationship between a plaintiff and a defendant. United Virginia Bank v. Air-Lift Assoc., 79 N.C. App. 315, 339 S.E.2d 90 (1984). Neither is it an action based wholly in tort. Bernard, 68 N.C. App. at 230, 314 S.E.2d 582, 584. It is "the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor

wholly contractual in nature. . . ." Id. (quoting Stanley v. Westwood Auto, Inc., 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975)). While fraudulent behavior may evoke the action, it is not an action for fraud. Holley v. Coggin Pontiac, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, disc. rev. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

It is clear to this court that Chapter 75 creates a cause of action unlike any other. It is because of the unique nature of this cause of action that the court, with plaintiff's consent presented Issue 8 to the jury in the form of interrogatories delineating specific conduct. The jury then determined that some of the defendants engaged in some of that conduct. The court will not now go beyond the answers given by the jury to base a Chapter 75 award upon the general verdicts as to other, clearly distinct, causes of action. The trebling of the damages as required by Chapter 75 award, will be based only upon the jury's response to those specific interrogatories of Issue 8.

Plaintiff has requested that it be awarded prejudgment interest on the compensatory damages award because such should be regarded as substantive right under North Carolina law. It is true that the courts have held that state law applies to questions involving prejudgment interest in diversity cases. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941); Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 633 (4th Cir. 1999); United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938 (4th Cir. 1983). However, this case, while it does involve state law causes of action, does not derive its federal jurisdiction from diversity of citizenship but from its relationship to a bankruptcy proceeding. Therefore, "the district court is not bound by the interest rate of the forum state in determining the rate of prejudgment interest, but must use its discretion in setting the proper rate." Dollar Rent A Car Systems, Inc., 712 F.2d at 941. See also, E.E.O.C. v. Liggett & Myers, Inc., 690 F.2d 1072 (4th Cir. 1982) (determination of certain rate of prejudgment interest generally matter within

discretion of district court). In exercising this discretion, the court will look to North Carolina law for guidance.

North Carolina General Statute §24-5 provides in part

> (b) . . . In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in action other than contract shall be at the legal rate.

N.C. Gen. Stat. §24-5 (Supp. 1998). Because there were several causes of action, including contract, tort and Chapter 75, for which the jury awarded damages, the court will apply the above quoted statute. The jury found the amount of compensatory damages to be $6,491,835.00.

The legal rate in North Carolina is 8% per annum. N.C. Gen. Stat. §24-1 (Supp. 1998). Prejudgment interest from the date that the action was instituted, 25 February 1997, until the entry of judgment, 25 November 1998, will be calculated at this rate. The amount will be calculated on the jury's award of compensatory damages, not on the trebled amount, for a total compensatory award as follows:

$6,491,835.00 x .08 = $519,346.80

Interest for 25 February 1997 - 24 February 1998 = $7,011,181.80. (6491835.00 + $519,346.80)

$7,011,181.80 x .08 = $560,894.54.

Interest prorated for partial year from 25 February 1998 - 25 November 1998 (273 days) = $560,894.54 divided by 365 = $1,536.70 (daily interest amount).

$1,536.70 x 273 = $419,519.10

$7,011,181.80 + $419,519.10 = $7,430,700.90

This amount will be imposed against the two defendants, Scharf and Dapuzzo, and postjudgment interest will accrue on that amount at the federal rate from 25 November 1998 in the manner established in 28 U.S.C. §1961. That amount will be trebled as to those defendants who the jury found engaged in any of the conduct specified in Issue 8 of the interrogatories for a total judgment against those defendants in the amount of $22,292,102.70. Postjudgment interest will accrue on the trebled amount from the date of the entry of judgment until the judgment is fully paid at the interest rate established for all federal judgments pursuant to 28 U.S.C. §1961. See Forest Sales Corp v. Bedingfield, 881 F.2d 111 (4th Cir. 1989); Custom Molders, Inc. v. American Yard Products, Inc., 324 N.C. 133, 463 S.E.2d 199 (1995).

C. Plaintiff's Motion for Sanctions against Jacobs Group defendants for filing Motion to Dismiss for Lack of Subject Matter Jurisdiction

Rule 15 of the Local Rules of this court states: "If any attorney or any party fails to comply in good faith with any local rule of this court, this court in its discretion may impose sanctions." (Local Rule 15 EDNC). The court will apply this Rule to this, and all other motions for sanctions, unless otherwise noted.

On 29 October 1998, plaintiff filed an opposition to the Jacobs Group defendants' motion to dismiss for lack of subject matter jurisdiction and included therein, a motion for sanctions. The motion to dismiss was denied; however, plaintiff maintains that it was only filed in an effort to delay trial and to distract plaintiff's counsel from trial preparation.

Plaintiff listed thirteen "tactics" it claimed these defendants engaged in from the time defendants' current counsel filed their notice of appearance on 11 September 1998 until the request for sanctions was made. While some of the items listed do appear questionable, the court cannot say they were for the purpose of delay. The motion to dismiss for lack of subject matter jurisdiction, likewise, may have been filed at a questionable time. However, all parties and the court are aware that subject matter jurisdiction is an issue that can be raised at any time by the parties or the court. See United States v. White, 139 F.3d 998, 999-1000 (4th Cir.) cert. denied, 119 S.Ct. 343 (1998). The filing of this motion, though done late in the game, is simply not something upon which this court will base sanctions. Plaintiff's motion will be denied.

D. Plaintiff's Motion for Sanctions and to Strike Jacob Group Defendants' Motions in Limine, Renewed Summary Judgment Motion, Amend Trial Memorandum and Proposed Jury Instructions

On 30 October 1998 plaintiff filed this motion for sanctions and to strike along with a supporting memorandum. Defendants responded on 2 November 1998. Plaintiff based its motion on the fact that defendants' filings were untimely pursuant to Local Rule 25.01 EDNC which requires all motions in limine, trial memoranda, and proposed jury instructions to be filed "five business days preceding the first day of the session at which a civil action is set for trial. . . ." The trial of this matter was set for 2 November 1998, thus making 26 October 1998 the deadline for such filings. Defendants filed the motions in limine about which the plaintiff complains on 27 and 28 October 1998 and the proposed jury instructions on 29 October 1998. They filed the amended trial memorandum on 27 October 1998 and the proposed jury instructions on 29 October 1998.

As the trial of this matter is concluded, and the motions in limine at issue were denied, the request to strike these filings will be denied as moot. The request for sanctions will also be denied. As to the motions in limine, they were untimely by only one day. Additionally, the topic that these motions addressed were related only to damages and plaintiff was able to respond to them at the same time it responded to the timely filed motions in limine on 2 November 1998. (See Docket Entry 90, responding to these and other motions in limine). Plaintiff was obviously not prejudiced by this one-day late filing. As to the filing of the amended trial memorandum one day late, the analysis is similar. Plaintiff was not prejudiced by the delay. Further, these defendants technically complied by timely filing the original trial memorandum. The amendment filed on day later cannot be grounds for sanctions. Addressing the late filing of the jury instructions, it should be noted that these materials are filed in order to assist the court in preparation of the instructions it will ultimately give the jury an allow the parties an input into this process. The proposed instructions are not a filing to which the other side need respond. Thus, the fact that these defendants filed their proposed instructions three days late did not prejudice plaintiff. If anything, it prejudiced the court; however, such a minimal delay in the submission of the proposed instructions while not condoned by the court, will not be the basis for any sanction.

Finally, plaintiff directed this motion to the 27 October 1998 filing by defendants Queller; Queller, Inc., and Born of a renewed and supplemental motion for summary judgment. That motion was summarily denied in open court on 2 November 1998 and the request to strike it will be denied as moot. Plaintiff did not file a response to that motion and was not prejudiced by the untimely filing. While the motion might very well have been inappropriate given previous rulings by the bankruptcy court, its filing cannot support an award of sanctions.

E. Plaintiff's Motion for Sanctions against All Defendants' Failure to Respond to Discovery Related to Net Worth

The factual background underlying this motion is somewhat lengthy and must be recounted in order for the ruling of the court to be understood. On 4 February 1997, plaintiff served the Jacobs Group defendants with Interrogatories and Requests for Production of Documents seeking information about, among other things, the financial net worth of the defendants. On 25 April 1997, plaintiff served similar pleadings on defendants Lane, Rosen, Scharf and Dapuzzo. All defendants objected to the discovery requests as personal and confidential. On 10 March 1998, plaintiff moved to compel responses from defendants Lane, Rosen, Scharf and Dapuzzo and they again objected on 2 April 1998. On 11 May 1998, Bankruptcy Judge J. Rich Leonard held a hearing on plaintiff's motion to compel at which time he said that he would revisit the issue at the pretrial conference. On 7 October 1998, plaintiff moved to compel responses to the net worth discovery from the Jacobs Group defendants. On 22 October 1998, Judge Leonard ordered all defendants to respond fully to plaintiff's discovery requests regarding their financial net worth by close of business 30 October 1998.

The Jacobs Group defendants moved for a protective order and also wrote a letter to this court, with a copy to plaintiff's counsel, dated 30 October 1998 enclosing the pertinent documents in an effort to file the documents under seal.[2] By letter dated 30 October 1998 to counsel for the Jacobs Group defendants, plaintiff's counsel informed them that these actions were in violation of Judge Leonard's order. Thereafter, counsel for these defendants produced certain documents to plaintiff's counsel but requested they be kept

[2] Counsel did provide plaintiff with the net worth information for defendants EJ Servicing, Inc., EJ Realty Management Corp., and EJ Property Consultants, Inc. on 30 October 1998.

sealed pending a ruling from this court on the motion for a protective order.

On 30 October 1998, counsel for defendants Rosen, Lane, Scharf and Dapuzzo also moved for a protective order and attempted to file their responses to the net worth discovery under seal. Counsel for these defendants provided the documents to counsel for plaintiff on 1 November 1998, also requesting that they not be opened until a ruling on the motion for a protective order could be made. On 2 November 1998, plaintiff filed the instant motion pursuant to Fed. R. Civ. P. 37 requesting that the answer of defendants be stricken and default be entered for plaintiff as sanctions for the defendants' failure to comply with Judge Leonard's order.

On 2 November 1998, at a hearing on various motions in limine, this court denied defendants' motions for protective orders and gave to plaintiff the documents that defendants had given to the court, without reviewing them. On 9 November 1998, plaintiff again moved to compel discovery responses as to the net worth information, arguing that the documents received on 2 November 1998 form Robert Jacobs, Elliot Jacobs, Alan Mirwis, David Queller, David Queller, Inc., and Ira Born were incomplete and unverified and those pertaining to defendants Lane, Rosen, Scharf and Dapuzzo were unverified. By oral order of 9 November 1998, the court directed both groups of defendants to submit complete and verified net worth documentation by 2:00 p.m. on 10 November 1998.

Defendants Lane, Rosen, Scharf and Dapuzzo complied with the oral order of the court and submitted satisfactory documentation to plaintiff on 10 November 1998. On 16 November 1998, these defendants filed a written opposition to plaintiff's motion to compel of 9 November 1998. In this document, counsel for these defendants assert that any failure of these defendants to provide adequate net worth information to plaintiff in a

timely manner was in good faith and not an attempt to dodge the request or any court order pertaining thereto. Specifically, counsel state that as soon as they learned of Judge Leonard's 22 October 1998 order, they called their clients and instructed them to prepare net worth statements. They claim that the "outstanding document request accompanying the request for a net worth statement was simply overlooked. Nothing more, nothing less." (Defs' Resp. to Mot. to Compel at 2.) Further, these defendants assert that plaintiff did not truly confer with them before making this motion pursuant to Fed. R. Civ. P. Rule 37 as required by the rule, and that if they had, counsel for these defendants would have recognized the oversight and such a conference would have obviated the need for this motion. See Fed. R. Civ. P. 37(a)(2)(A).

The court finds the excusable neglect argument of defendants Lane, Rosen, Scharf and Dapuzzo persuasive. This is especially so in light of the fact that these defendants complied with the oral order of this court on 10 November 1998. Further, although plaintiff's receipt of the verified information during the on-going trial was certainly not the preferred time, it did not prejudice plaintiff, as plaintiff was able to get the net worth evidence as to these defendants before the jury.[3] While the behavior of these defendants and counsel on this matter was not exemplary by any stretch, the court will not impose sanctions upon defendants Lane, Rosen, Scharf or Dapuzzo, or their counsel, for any activity related to the net worth discovery information.

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[3] The court notes that these defendants filed a motion for a protective order on 30 October 1998 rather than complying with Judge Leonard's order of 22 October 1998. The court does not view the filing of this motion relevant to this motion for sanctions. At the time the motion for protective order was filed, these defendants had several motions in limine before this court relating to punitive damages, the rulings on which could have affected the need to produce net worth information.

As to the Jacobs Group defendants, however, the situation is different. These defendants did not file a written response to the 9 November 1998 motion to compel. Further, as of 24 November 1998, the day before the jury returned its verdict, defendants Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. had yet to fully comply with the oral order of the court requiring them to give plaintiff complete, verified documentation of net worth on 10 November 1998. In open court on 24 November 1998, plaintiff moved again for sanctions and contempt against these defendants for their continued failure to comply. As further support, the court received a letter dated 10 December 1998 from plaintiff's counsel indicating that, as of that date, these defendants still had not provided verified or sworn responses to the net worth discovery. It is obvious to the court that these defendants and their counsel ignored this court's oral order of 9 November 1998 and continue to do so. While plaintiff may not have made the requisite Rule 37 certification in its written motion for sanctions, or conferred with opposing counsel before filing the motion, the purpose of those requirements, which is to give the party who has failed to produce the requested material a final chance to do so without court intervention, certainly has been served. These defendants had numerous opportunities to produce the requested information and the fact that they still have not complied with the orders of this and the bankruptcy court cannot and will not go unpunished. The sanction of striking the answers of these defendants, while it may very well be appropriate, will likely be ineffective given the verdict of the jury. However, as the recitation of the history of this discovery dispute recounted above makes clear, these defendants deserve a severe sanction. They have blatantly refused to comply with an order of this court for in excess of four months, not even to mention their defiance of early orders on this issue. Further, the outstanding request might be easily complied with by the inclusion of a simple verification by the responding defendant.

Monetary sanctions will be imposed against these defendants. Plaintiff shall recover its reasonable fees and costs associated with its attempt to achieve meaningful responses to its discovery requests form Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. from 2 November 1998 to the present. Within 20 days of the receipt of this order, plaintiff shall file with the court documentation of these fees and costs. Such documentation shall include specific time entries describing what work was done, when it was done, the amount of time spent on any one task, the name of the individual doing the work, the billing rate of that individual, and the year of bar admission for each attorney included in this documentation. These defendants shall respond, if they so desire, within 10 days of plaintiff's filing. There will be no reply. The court will issue a subsequent order including the amount of sanctions.[4]

F. Defendants Lane, Rosen, Scharf and Dapuzzo's Motion Pursuant to Rule 37

On 11 December 1998, defendants Lane, Rosen, Scharf and Dapuzzo filed a motion for expenses and costs pursuant to Fed. R. Civ. P. 37(c)(2) on the grounds that at trial they had to make proof of numerous Requests for Admissions denied by plaintiff. On 5 January 1999, these defendants filed their memorandum in support of this motion.[5] Plaintiff filed a memorandum in opposition on 22 January 1999. Defendants did not file a reply.

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[4] The court's decision to enter these sanctions also addresses plaintiff's motion made in open court on 24 November 1998 for sanctions and contempt.

[5] The court allowed these defendants additional time to brief post-trial motions. The filing of this memorandum was, therefore, timely.

Rule 37(c)(2) states as follows:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves he genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The court shall make the order unless is finds that (A) the request was held objectionable pursuant to rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit has reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2). These moving defendants assert seven categories of requests for admissions that they served upon plaintiff, and which plaintiff denied, that defendants claim they were required "to spend enormous amounts of time and energy to prove the truth of the admissions." (Defs.' Mem. in Supp. of Rule 37 Mot. at 6) The court will not separately address each category enumerated by defendant but instead will address defendants' general arguments.

First, the court notes that the language of the rule itself states that it is only applicable to allow the recovery of fees and costs where the party seeking the admission later *proves* the matter denied. The court questions whether these defendants did in fact prove the matters included in the request for admissions at issue. Contrary to the defendants'

assertions, the verdict of the jury does not make this issue clear. Assuming, but not deciding, that these defendants did prove the matters denied by plaintiff, the court will, nonetheless, deny the motion on the ground that it was reasonable for plaintiff to believe that it would prevail on the matters in the requests. See Fed. R. Civ. P. 37(c)(2).

At trial, plaintiff presented evidence on the issues addressed in each category of the admissions delineated by defendants. While these defendants did counter plaintiff's evidence with evidence and arguments of their own, it was reasonable for plaintiff to believe that it would prevail. The court specifically finds that plaintiff had reasonable grounds to believe that it might prevail at trial on the matters it denied in the request for admission. For that reason the motion of defendants Lane, Rosen, Scharf and Dapuzzo pursuant to Fed. R. Civ. P. 37(c)(2) defendants will be denied.

G. Jacobs Group Defendants' Motions for Judgment as a Matter of Law, for a New Trial and to Alter Judgment

On 11 December 1998, the Jacobs Group defendants filed motions for relief pursuant to Fed. R. Civ. P. 49, 50(b), 58 and 59(e) and memoranda in support thereof. Plaintiff responded to these motions on 31 December 1998, and defendants filed a reply on 25 January 1999. As grounds for their motions pursuant to Rules 49, 58 and 59(e), these defendants assert the jury verdict and the answers to verdict interrogatories are inconsistent and that the court should alter or amend the verdict to be consistent. Plaintiff responds that this motion is untimely as it was required to be made prior to the discharge of the jury.

The Fourth Circuit has written of Fed. R. Civ. P. 49(b) that "[i]nherent in [its] language is the imposition of an obligation upon trial counsel to object to any asserted inconsistencies in the response to jury interrogators prior to

the discharge of the jury." White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir.) cert. denied, 493 U.S. 964 (1989) (citing Fernandez v. Chardon, 681 F.2d 42, 58 (1st Cir. 1982); Merchant v. Ruhle, 740 F.2d 86, 89 (1st Cir. 1984)). In White the court of appeals affirmed the district court's denial of a Rule 49(b) motion because the moving party had failed to timely file an objection to the verdict when they did so a few hours after the jury was dismissed. Id. at 145. "Proper respect for the Rule mandates that the failure to bring any purported inconsistencies in the jury's verdict to the attention of the court prior to the release of the jury will constitute a waiver of a party's right to seek a new trial." Id. at 146.

In the case at bar, no party made any argument that any portion of the jury's verdict was inconsistent prior to the discharge of the jury. These defendants now assert, in a motion filed one week after the discharge of the jury, that the interrogatories and general verdict were inconsistent. Pursuant to the reasoning of White and the language of Fed. R. Civ. P. 49(b), this will be denied as untimely.

The Jacobs Group defendants also moved for judgment as a matter of law and a new trial under Fed. R. Civ. P. 50(b). As grounds for this motion, they reassert that this court is without subject matter jurisdiction as plaintiff's case is not "related to" any bankruptcy proceeding. They further argue that plaintiff's claim of civil contempt is baseless, or in the alternative, is barred by res judiciata. The issues surrounding plaintiff's civil contempt claim are addressed in another section of this order. Finally, defendant's maintain that there was insufficient evidence for any of plaintiff's claims to be submitted to the jury or to support the jury's verdict.

Plaintiff responds that these arguments state no new legal bases for the motion, but merely rehash those arguments previously made to, and rejected by, this and the bankruptcy court. Plaintiff also argues that these defendants have not properly made a motion for a new trial under Fed.

R. Civ. P. 59. In their reply, defendants state that they did make a motion for a new trial as authorized under Fed. R. Civ. P. 50(b) which is entitled "Renewing Motion for Judgment After Trial; Alternative Motion for New Trial." The language of Rule 50(b) does allow for a party renewing its motion for summary judgment as a matter of law to "alternatively request a new trial or join a motion for a new trial under Rule 59." Fed. R. Civ. P. 59(b) Although defendants' motion does not specifically invoke Rule 59 as a ground for a new trial, it does invoke the language of Rule 50(b) above and include the specific request that the court "order a new trial." (Defs' Mot. Pursuant to Rule 50(b) for Post-Trial Relief at 2.) Thus the court will entertain defendants' motion under Rules 50(b) and 59.

A motion pursuant to Fed. R. Civ. P. 50(b) is a renewal of a motion pursuant to Fed. R. Civ. P. 50(a) made at the close of evidence and the standards of review for both motions are the same. This standard requires that a Rule 50 motion be granted when there is no substantial evidence to support the jury's verdict. At the close of the presentation of evidence by all parties at trial, this court determined the evidence to be legally sufficient to submit plaintiff's claims to the jury. The court remains convinced that there was substantial evidence to support plaintiff's claims against the Jacobs Group defendants. For this reason, the Rule 50(b) motion will be denied.

There is no fixed standard for evaluating a motion for a new trial pursuant to Fed. R. Civ. P. 59, thereby giving the trial court wide discretion. City of Richmond v. Atlantic Co., 273 F.2d 902, 916 (4th Cir. 1960); Moore's Federal Practice, 3rd Ed. § 59-13. However, a district court should order a new trial only in the limited circumstance where a "miscarriage of justice would result if the verdict were to stand." Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3rd Cir. 1993). Such a limited circumstance is

not present here. There will not be a miscarriage of justice if the verdict of this jury is allowed to stand. Defendants' motion for a new trial will be denied.

These defendants also moved pursuant to Fed. R. Civ. P. 58 and 59(e). These motions will be denied, as there is no cause to alter or amend the judgment. Finally, these defendants in their post-trial motions again argued that this court does not have subject matter jurisdiction over this case. This court has already denied that motion and again states that it believes that there is a sufficient relationship between the bankruptcy code and the issues presented to the jury in this case to support subject matter jurisdiction.

H. Motions of Defendants Lane, Rosen, Sharf and Dapuzzo for Judgment as a Matter of Law

Like the Jacobs Group defendant, defendants Lane, Rosen, Scharf and Dapuzzo, have renewed their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) and moved for a new trial pursuant to Fed. R. Civ. P. 59. The standards recited above apply to those motions. The court finds that there was sufficient evidence to support the verdict as to the Lane defendants and thus there will be no miscarriage of justice if the verdict of the jury is allowed to stand. Thus, the Lane defendants' motions pursuant to Fed. R. Civ. P. 50(b) and 59 will be denied.

These defendants asserted, for the first time during the course of this action, the application of the Noerr-Pennington Doctrine[6] as a bar to all plaintiff's claims against them. Broadly stated, this doctrine prohibits the imposition of liability, on any theory, for litigating a claim. See, e.g.,

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[6] The doctrine gets its name from two Supreme Court decisions: Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and UMW v. Pennington, 381 U.S. 657 (1965).

California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972). There is a "sham" exception to this doctrine to which the United States Supreme Court recently discussed in Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993). The Court clarified the two elements of this exception by explaining that at the challenged lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and that "only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." Id. at 60. Thus, these defendants' assert that plaintiff must first show that the December 1996 appeal was baseless before the defendants' motive becomes relevant. They argue that plaintiff has not shown that appeal to be objectively baseless and thus, the court should not and cannot examine the motives behind that appeal.

The court agrees completely with defendants' statement of the elements of the Noerr-Pennington doctrine and their discussion concerning the sham exception. However, the doctrine does not come into play in this case for the simple reason that the defendants waived their right to rely upon it. Noerr-Pennington immunity is an affirmative defense, North Carolina Electric Membership Corp. v. Carolina Power & Light Co., 666 F.2d 50, 52 (4th Cir. 1981), which must be pled pursuant to Fed. R. Civ. P. 8. Resolution Trust Corp. v. Southwest Development CO., 807 F. Supp. 375, 379 (E.D.N.C. 1992) aff'd in part, rev'd in part on other grounds, 14 F.3d 596 (4th Cir. 1993). An affirmative defense that is not raised in an answer is waived. Id.; Harris v. Secretary of U.S. Dept. of Veterans Affairs, 126 F.3d 339, 343, 345 (D.C. Cir. 1997).

Even assuming that these defendants did not waive Noerr-Pennington immunity by failing to plead it, the court finds that the sham exception applies to the facts of this case. In order for litigation to be a sham, it must be objectively baseless in a sense that no reasonable litigant could realistically expect to succeed on the merits. City of

Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991). Only if this first part is satisfied may a court examine the litigant's subjective motivation to determine if the baseless conduct was an "attempt to interfere directly with a competitor's business relationships, through the use of the litigation process - as opposed to the outcome of that process - as an anticompetitive weapon." Id. In examining the first part of the test, the court is convinced that plaintiff's evidence at trial established that the appeal was objectively baseless. Defendants attempt to rely upon the opinion of Steve Beaman as to the merits of the appeal. However, the re-direct examination of Mr. Beaman by plaintiff revealed that at the time the appeal was filed, he had not evaluated its merits. From the totality of the evidence, the court determines that the appeal at issue was objectively baseless.

Having made this determination, the subjective motivation of the defendants becomes relevant. On this issue, the plaintiff again produced sufficient evidence that the reason for the appeal was to prevent the designee of the Sonnenschine Group, New Horizon, from exercising its option under its contract with Tudor. In reviewing the second element of the sham exception, the Supreme Court distinguished between situations in which a defendant acted through litigation to achieve a specific governmental result from those where a defendant acted though litigation to injure or interfere with the business of another or merely to impose expense or delay, finding that the latter was impermissible. See, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991). The evidence presented at trial was clear that these defendants were involved in a situation akin to the latter. The court finds that defendants' motivation was to hinder plaintiff's ability to exercise its option and that such conduct satisfies the second element required for the invocation of the sham exception to the Noerr-Pennington doctrine.

I. Plaintiff's Motion to Strike Supplemental Proffer of Evidence

On 10 February 1999, the Jacobs Group defendants filed a Supplemental Proffer of Evidence in Support of Defendants' Post-trial Motions (supplemental proffer). The supplemental proffe consisted of a two-page memorandum and the affidavits of two jurors to the effect that "it was the verdict of the jury that the limited partner defendants should be held only nominally liable in this case." (Supplemental Proffer ¶ 5.) On 18 February 1999, plaintiff moved to strike the supplemental proffer and for costs and fees related to the motion and field a combined memorandum in support. Plaintiff asserts that the supplemental proffer violates of Fed. R. Evid. 606(b) which governs the use of juror testimony to inquire into the validity of the verdict, and that even if the proffer is accepted by the court, it does not support the relief sought by defendants. The Jacobs Group defendants filed a response on 5 March 1999, stating that the jurors' affidavits were not offered to impeach the jury's verdict, but to demonstrate that the verdict reported to the court was not the actual verdict agreed upon by the jury. These defendants also moved for costs and fees associated with the filing of the response to the motion to strike. Plaintiff filed a reply on 12 March 1999 reasserting the inadmissibility of the affidavits and the argument that the affidavits do not support the relief sought.

Federal Rules of Evidence 606(b) governs the admissibility of the supplemental proffer. It states, in relevant part:

> a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the to effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to gear upon any juror. Nor may a juror's affidavit of evidence of any statement made by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The policies behind this rule are the "freedom of deliberation, stability and finality of verdicts and protection of jurors against annoyance and embarrassment." (Advisory Committee Notes, Fed. R. Evid. 606.)

The content of the affidavits at issue speaks directly to the deliberative process. The affidavits, which are suspiciously similar, explain that the "jury was confused by the Court's instructions and the form and structure of the verdict sheet" and was "precluded from returning its verdict in relation to each individual defendant by the form and structure of the verdict sheet." (Lumsden Aff. ¶¶ 8, 7; Pyhser Aff. ¶ ¶ 8, 7.) These statements provide a view into the deliberative process in that they give the reader an idea of the way in which the jury evaluated the liability of each defendant. Such juror testimony is quite simply prohibited by the rule as written. Further, the statements clearly suggest that the jury was confused by the instructions and the relationship between them and the verdict form. Any evidence that the jury misunderstood the instructions is

prohibited by Rule 606(b). See Peterson v. Wilson, 141 F.3d 573, 578 (5th Cir. 1998) (reversing new trial granted on basis of ex parte, post-verdict discussion between judge and jury indicating jury disregarded instruction because information came directly from internal deliberations); Peveto v. Sears & Roebuck & Co., 807 F.2d 486 (5th Cir. 1987) (judgment not amended when only basis was jury testimony barred by Rule 606). Defendants' assertion that these affidavits do not reflect the mental processes of the jury is disingenuous and their attempt to distinguish the confusion surrounding the verdict form from any confusion surrounding the instructions is unavailing. Plaintiff's motion to strike will be allowed. All motions for fees and costs relating to the supplemental proffer will be denied.

III. CONCLUSION

For the reasons stated above, plaintiff's claim for civil contempt of court and plaintiff's motions for sanctions against the Jacobs Group defendants for filing the motion to dismiss for lack of subject matter jurisdiction; to strike and for sanctions against the Jacobs Group defendants relating to defendants' late filing of two motions in limine, renewed motion for summary judgment, amended trial memorandum and proposed jury instructions; for sanctions regarding the failure of defendants Lane, Rosen, Scharf and Dapuzzo to respond to interrogatories and requests for production as to net worth; and, for fees and costs relating to the supplemental proffer offered are DENIED. The motion of the Jacobs Group defendants for judgment as a matter of law, for a new trial and to alter or amend judgment are DENIED. The motions of defendants Lane, Rosen Scharf and Dapuzzo for judgment as a matter of law and for a new trial and for expenses and costs pursuant to Fed. R. Civ. P. 37 are DENIED. Plaintiff's motion to strike the supplemental proffer is ALLOWED, and that document and its attachments are hereby STRICKEN. Plaintiff's motion for

sanctions against the Jacobs Group defendants for failure to respond to discovery regarding net worth is ALLOWED as to defendants Robert Jacobs, Elliot Jacobs, Mirwis, Born, Queller and Queller, Inc. and plaintiff shall have and recover from these defendants its reasonable attorneys' fees related to that matter from 2 November 1998 to date. As stated above, plaintiff shall file an affidavit and supporting documentation in support of that amount within 20 days of the date of this order. These defendants shall have 10 days from the date of plaintiff's filing to respond. Plaintiff shall have and recover $22,292,102.70 from defendants with liability for this total amount apportioned as follows:

a) defendants Stanley Lane; Howard Rosen; David Queller, David Queller, Inc., Ira Born; Robert Jacobs; Elliott Jacobs; Alan Mirwis; E.J. Servicing, Inc.; E.J. Realty Management, Corp.; and, E.J. Property Consultants are jointly and severally liable in the amount of $14,861,401.80;

b) all defendants are jointly liable in the amount of $7,430,700.90.

This 19 July 1999.

\s\ W. Earl Britt
W. EARL BRITT
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: December 14, 2000

No. 00-1701

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,
Defendants-Appellants,

and

ALAN JACOBS; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.; RUTH SCHARF,
Defendants.

ENTERED: DECEMBER 14, 2000

ORDER

On November 28, 2000 we filed our order denying the petition for rehearing and rehearing en banc in the two cases which are the basis for the attorneys fees at issue in this case. Those cases are New Horizion of NY LLC v. Jacobs, et. al., No. 99-1996, above mentioned.

We have before us in this case the motion of Jacobs, et al., field June 16,2 000, to stay all proceedings in this case, the motion of New Horizon, filed June 26,2 000, to dismiss the appeal of Jacobs, et al. in this case, and the motion of Jacobs, et al., filed November 20, 2000, for summary reversal in this case.

It is accordingly ADJUDGED and ORDERED as follows:

1. The motion for summary reversal of Jacobs, et al., shall be, and the same hereby is, granted.

2. It is further ORDERED and ADJUDGED that the motion of Jacobs, et al., for a stay, and the motion of New Horizion of NY LLC to dismiss the appeal, shall be, and the same hereby are, dismissed without prejudice as moot.

With the concurrences of Judge Micahel and Judge Motz.

/s/H.E. Widener, Jr.
For the Court

NOTICE: THIS IS AN UNPUBLISHED OPINION

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

TUDOR ASSOCIATED, LTD., II, A Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, Plaintiff - Appellant,

and

Joseph N. CALLAWAY, Trustee for Tudor Associates, Ltd., II, Plaintiff,

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; E.J. Realty Management Corporation; a New Jersey Corporation; Roberts Jacobs; Garden National Properties, Incorporated, a New Jersey Corporation; Alan Jacobs, Defendants - Appellees.

TUDOR ASSOCIATES, LTD., II, a Nebraska Limited Partnership, by and through its Trustee, Joseph N. Callaway, Plaintiff - Appellee,

and

Joseph N. CALLAWAY, Trustee for Tudor Associates, Ltd., II, Plaintiff,

v.

AJ & AJ SERVICING, INCORPORATED, a New Jersey Corporation; Robert Jacobs, Defendants - Appellants,

and

E.J. Realty Management Corporation, a New Jersey Corporation; Robert Jacobs; Garden National Properties, Incorporated, a New Jersey Corporation; Alan Jacobs, Defendants.

Nos. 93-2294-93-2326.

Sept. 20, 1994.
Argued June 7, 1994.
Decided Sept. 20, 1994.
Entered: September 20, 1994

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree, Jr., Senior District Judge.

ARGUED: R. Stuart Huff, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida, for Appellant.

E.D. Gaskins, Jr. EVERETT, GASKINS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees.

ON BRIEF: Mark L. Mallios, LAW OFFICES OF R. STUART HUFF, Coral Gables, Florida; Joseph N. Callaway, II, BATTLE, WINSLOW, SCOTT & WILEY, P.A., Rocky Mount, North Carolina; Irvin P. Breedlove, Jr., STUBBS, COLE, BREEDLOVE, PRENTIS & BIGGS, Durham, North Carolina, for Appellant.

Katherine A. O'Connor, Robert H. Gourley, Jr., EVERETT, GASKINGS, HANCOCK & STEVENS, Raleigh, North Carolina, for Appellees.

E.D.N.C.

AFFIRMED IN PART AND REVERSED IN PART.

Before ERVIN, Chief Judge, MICHAEL, Circuit Judge, and JACKSON, United States District Judge for the 6350 35 8
Eastern District of Virginia sitting by designation.

OPINION

ERVIN, Chief Judge:

**1 Tudor Associates, Ltd., II, ("Tudor") is a debtor in the United States Bankruptcy Court for the Eastern District of North Carolina. This suit arises out of the sale in 1979 of certain tudor assets in a transaction involving Executive Management Trustees, Inc. ("EMT") and AJ & AJ Servicing, Inc. ("AJ"). Tudor filed a suit against EMT and AJ in bankruptcy court in 1983, alleging that the transaction was fraudulent. The bankruptcy court entered judgment in favor of Tudor in 1988, granting Tudor a one-half interest in certain mortgages from the 1979 deal. The court found that AJ had acquired the other half interest in the mortgages as a bona fide purchaser. AJ was ordered by the court to pay the money due Tudor from its interest in the mortgages as AJ collected the monthly payments.

Dissatisfied with AJ's performance, Tudor filed its complaint in this diversity action on June 7, 1991 in the United States District Court for the Eastern District of North Carolina. Following an amendment to the complaint in September 1992, the claims against AJ include breach of fiduciary duty, breach of contract, unfair and deceptive trade practices, conversion, fraud on the court, and RICO. The district court granted summary judgment in favor of AJ on all claims as to any liability for acts occurring prior to the bankruptcy court decision of September 14, 1988. The court also granted summary judgment on the RICO and fraud on the court claims.

Following trial in June 1993, the jury returned a verdict for Tudor against AJ in the liability phase and found compensatory damages in the amount of $529,696.50 and punitive damages in the amount of $7 million. The district court granted judgment as a matter of law in favor of AJ on the claims for conversion, breach of fiduciary duty, unfair trade practices, and punitive damages. In sum, only the

breach of contract verdict and the compensatory damage award were allowed to stand. Tudor appeals the decision of the district court. For the reasons set forth below, we affirm in part and reverse in part.

I.

In 1979, Tudor was a debtor in bankruptcy. Its sole assets were four rental properties located in North Carolina. The bankruptcy court approved the sale of these properties to EMT. EMT then simultaneously deeded the properties to three limited partnerships. EMT financed its purchases from Tudor with wraparound mortgages totaling approximately $20 million. Under this arrangement, the wraparound mortgage becomes a junior mortgage and the mortgageholder (EMT) makes payments to the senior mortgageholders (those to whom Tudor had been paying on the original mortgages) from the payments it receives on the wraparound.

Through their wholly owned corporation, AJ & AJ Servicing, Inc., Alan Jacobs, an attorney, and Robert Jacobs, an accountant, formed the three limited partnerships and brought these buyers to the deal with EMT. Alan Jacobs negotiated a "finder's fee" to be paid by EMT to AJ. The fee agreement was set forth in a series of letters between EMT and AJ. As collateral security for the fee agreement, EMT assigned a one-half interest in the mortgages to AJ. AJ was appointed as servicing agent to collect the monthly mortgage payments due from the limited partnerships, to pay itself the amount due under the fee agreement and to remit the balance to EMT. The arrangement was scheduled to end in September 1999, apparently when the wraparound mortgages would be paid in full.

**2 In 1983, Tudor filed an action in bankruptcy court alleging that the 1979 sale was a fraud on Tudor and the bankruptcy court by EMT (through its main actor, George Osserman) and by Jacobs. Apparently, EMT was not

making the necessary payments to the senior mortgage holders. Tudor sought to have the properties returned to it free and clear of the EMT mortgages. On September 14, 1988, the bankruptcy court found fraud on the part of EMT, but found that AJ had properly acquired its interest in the mortgages. The court entered a verdict in favor of Tudor against EMT in the amount of $11.6 million with interest from 1979 and awarded Tudor an equitable lien on the one-half interest in the mortgages not assigned to AJ. The court ordered AJ to file an accounting of all mortgage payments collected, to pay any funds held on behalf on EMT to Tudor, and to make future monthly accountings of all monies collected and to pay Tudor its onehalf interest in the mortgages. When AJ failed to perform as required under the judgment, Tudor instituted this suit.

II.

The district court granted summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988. It did so on the basis of res judicata, and the applicable statutes of limitations.

A.

The district court applied res judicata, holding that all claims between Tudor and AJ arising out of the 1979 transaction up to the date of the bankruptcy court's judgment were adjudicated in that action and cannot now be relitigated.

For res judicata to apply, there must be (1) a final judgment, (2) identity of the cause of action in the former and instant suits, and (3) identity of the parties or their privies in both suits. *Meekins v. United Transp. Union,* 946 F.2d 054, 1057 (4th Cir. 1991).

In the bankruptcy court case, Tudor claimed fraud on the court and sought to have the 1979 transaction set aside. It sought to have title to the properties returned to it free and clear of the EMT mortgages. Tudor claimed that AJ participated in the fraud by EMT, or at least had knowledge of EMT's fraudulent scheme. The bankruptcy court found that there had indeed been fraud on the part of EMT, but that AJ had secured its interest in the deal as a bona fide purchaser. Tudor was awarded EMT's interest in the mortgages and AJ was ordered to account for all past and future collections of mortgage payments and to remit to Tudor all funds owing to EMT.

In this action, Tudor claims that AJ has breached the duty imposed on it by the bankruptcy court. That duty required AJ to account not only for prospective amounts, but to disclose and account for payments collected since 1979. AJ's duty to Tudor with respect to payments from 1979 arose with the bankruptcy court's decision in 1988. Tudor could not have litigated AJ's liability for breach of that duty in the bankruptcy court action because the duty did not then exist. There is no identity of cause of action between the 1988 suit and the instant claims. Because the second prong of the res judicata test is not met, res judicata does not apply. The district court incorrectly applied res judicata to grant summary judgment as to claims of liability for any acts occurring before September 14, 1988.

B.

**3 The district court also ruled that certain of Tudor's claims were partially barred by the applicable statute of limitations. The reasoning for each claim was somewhat different.

For the breach of contract claim, the district court analogized AJ's conduct to a refusal to pay on a continuation or installment contract, applying the North Carolina rule that the cause of action accrues against each installment as it

becomes due. To determine the date prior to which no acts could be considered, the district court counted back three years from the date of the complaint and held that no actions prior to June 7, 1988 could be considered.

For the breach of fiduciary duty and conversion claims, the court determined that the causes of action accrued when Tudor made a demand for payments due, which AJ refused. The court determined that Tudor had made such a demand at the time of the pre-trial order issued in March 1987 by the bankruptcy court. The district court then found that it should count back three years from the date of the complaint and bar consideration of acts occurring prior to June 7, 1988. The court does not explain why, if the actions accrued in 1987 in its view, the actions would not be barred by a compliant filed more than three years later.

For the Unfair and Deceptive Trade Practices Act claim, the district court determined simply that the four-year limitations period prohibited consideration of all acts occurring prior to June 7, 1987 (four years before the filing of the complaint).

We find the court's reasoning as to each of these claims unconvincing. We hold that AJ had no duty to Tudor until that duty was imposed on it by the bankruptcy court in 1988. Furthermore, Tudor had no right to sue until this duty arose. A cause of action accrues, starting the limitations period, as soon as the right to institute and maintain a suit arises. *Pierson v. Buyher*, 409 S.E.2d 903, 905 (N.C. 1991). Until a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie. *Id. at 906.* Tudor's causes of action therefore arose on September 14, 1988, and none were barred at the time it filed its complaint on June 7, 1991.

AJ's duty, imposed in 1988, relates back to 1979 when AJ began collecting payments under the mortgages. *Marbach v. Gnadl*, 219 N.E. 2d 572, 579 (Ill. App. 1966) (an equitable lien, though not judicially recognized until a judgment is rendered declaring its existence, relates back to

the time it was created by the conduct of the parties). The fact that the causes of action accrued in 1988 is no reason to prohibit consideration of acts occurring prior to that time. For example, in a standard breach of fiduciary duty claim, the cause of action arises when the plaintiff becomes aware of the breach. The statute of limitations begins running at that point. The jury may, and in fact must, consider the fiduciary's acts that occurred prior to the plaintiff's discovery of the misconduct. There is no basis for prohibiting consideration of events occurring prior to September 14, 1988. We reverse the district court's grant of summary judgment in favor of AJ partially barring Tudor's claims on the basis of statutes of limitations.

III.

**4 The district court granted summary judgment in favor of AJ on Tudor's RICO claim. Because, inexplicably, neither Tudor's complaint nor AJ's motion for summary judgment are included in the joint appendix, reviewing whether Tudor made sufficient allegations to support its RICO claim is very difficult. However, based on the nature of the conduct at issue, we hold that AJ's conduct does not support a RICO violation.

To prove a RICO violation, the plaintiff must show a pattern of racketeering activity. A pattern will be found where there is continuity of the predicate acts and a relationship of the acts indicating a common purpose. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). While there must be at least two predicate acts, something more than simply a specified number of acts is required to demonstrate a pattern. *Id.* at 238.

This court has held that the pattern requirement is meant "to prevent ordinary commercial fraud from being transformed into a federal RICO claim." *Id.* at 685. To determine if fraudulent scheme rises to the level of a RICO violation, the court must determine its scale, duration and

number of victims. *Id.* RICO is reserved for those schemes whose scope and persistence set them above the routine. *American Bankers Inc. Co. v. First Union Nat'l Bank*, 699 F. Supp. 1174, 1178 (E.D.N.C. 1988). *American Bankers* involved injury to a credit insurer resulting from a fraudulent corporate bond program. The defendants were various financial institutions and law firms that had structured and administered the program. The court found that the ongoing program constituted a "single scheme designed to inflict a single injury on a single victim and as such, ...lack[ed] the scope and dimension necessary to form a RICO pattern." *Id.*

While Tudor may have alleged multiple predicate racketeering acts, AJ's reprehensible fraudulent conduct amounted to a single scheme to defraud Tudor of money due under the mortgages. Despite the fact that the scheme lasted over ten years and involved millions of dollars, it nonetheless involved a single scheme to inflict a single injury on a single victim. As such, it does not rise to the level of conduct necessary to support a RICO recovery. The district court properly granted summary judgment.

IV.

The jury returned a verdict indicating that AJ had converted to its own use, from the revenues collected under the contract with EMT to which Tudor succeeded, money to which Tudor was entitled and had done so with gross, willful, reckless or wanton disregard for the rights of Tudor. The district court granted judgment as a matter of law in favor of AJ on this conversion claim, overturning the jury's verdict.

A grant of judgment as a matter of law is reviewed to determine whether the record as a whole, viewed in the light most favorable to the nonmoving party, presents substantial evidence opposed to the motion. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980). Judgment as a matter of law should not be granted unless the

evidence is so clear that reasonable people could reach no other conclusion than the one suggested by the moving party. *Persinger v. Norfolk & Western R. Co.*, 920 F. 2d 1185, 1189 (4th Cir. 1990).

**5 The district court gave three separate reasons for its grant of judgment as a matter of law on Tudor's conversion claim. First, the court determined that a separate tort must accompany a breach of contract before conversion can be found. The court based this finding on Florida and Maryland law. However, under the controlling North Carolina law, the tort of conversion is found where there has been the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. " *Garvin v. Fayetteville*, 401 S.E. 2d 133, 134 (N.C.App. 1991). If a jury finds those elements, it can properly find conversion without any specific finding of a separate tort. There was substantial evidence that AJ's fraudulent conduct converted Tudor's property to its own benefit. The district court erred in granting judgment as a matter of law on this reasoning.

The district court next found that conversion could not lie because Tudor's claim was based on the bankruptcy court's judgment and a judgment is not capable of being converted. North Carolina law provides that a judgment is neither goods nor a chattel and that a judgment creditor has no property interest in the judgment sufficient to support an action for its conversion. *Cobb. v. Cornegay*, 28 N.C. 358, 359 (1846). The court in *Cobb* made it clear, however, that it was referring to the literal judgment in the case, the piece of paper on which the court's decision was recorded. The actual judgment was characterized as a public writing belonging to "the justice who gave it, as a public custodier, to be kept by him until drawn out of his hands by the regular requirements of the law. " *Id.* Tudor is not suing for the conversion of the document granting it an interest in the mortgages, but for the amounts due under its equitable lien.

Because those amounts can be converted, the district court's reasoning is inapposite.

The district court finally held that because Tudor has no more than an equitable lien on the mortgages, its interest is not sufficient and its conversion claim must fail. The court quotes *Am. Jur. 2d,* "Conversion" §80 and the cases cited therein for the proposition that a mere equitable interest in personal property will not support an action for conversion. That section, however, relates principally to the type of interest an intended beneficiary has in a life insurance policy; its interest is not fixed because it has no legal right of possession of the property. Tudor has more than a mere floating equitable interest in the mortgage proceeds; the bankruptcy court judgment established Tudor's interest and required AJ to pay the proceeds to Tudor. *Am.Jur.2d,* "Liens" §60 recognizes that a lienholder may sue for conversion of the property on which his lien exists if it is wrongfully disposed of by the owner. The district court erred in determining that Tudor did not have an interest in the mortgages sufficient to support conversion. We reverse the district court's grant of judgment as a matter of law on Tudor's conversion claim. The jury's verdict will stand.

V.

**6 The district court granted judgment as a matter of law in favor of AJ on Tudor's Unfair and Deceptive Trade Practices Act claim, reversing the jury's verdict. As recognized by the district court, the jury found that AJ engaged in unlawful practices by concealing from plaintiff revenues collected in servicing the wrap around mortgages to which plaintiff was entitled by depositing such revenues in various bank accounts unknown to plaintiff; that it filed false and deceptive reports with the bankruptcy court; that it misrepresented to plaintiff his rights to revenues collected: that it misled or deceived plaintiff as to the application of revenues collected; that it concealed from plaintiff the

identity and ownership of the persons and corporations to whom management fees were being paid; that it falsely represented to the plaintiff that expenses for attorney's and accounting fees were related to the operation of the properties; that it falsely represented to the plaintiff that additional management fees had been approved by the property owners; that these acts were committed by AJ in commerce; and that the acts were the proximate cause of damage to the plaintiff.

J.A. 182-83. The district court then noted that nothing else appearing, these findings would seem to constitute unfair and deceptive trade practices under the Fair Trade Act and would justify a ruling by the court under North Carolina law that plaintiff is entitled to recover treble damages.

J.A. 183. The district court then held that judgment as a matter of law was appropriate nonetheless because under North Carolina law, a simple breach of contract does not constitute an unfair trade practice. North Carolina law also provides, however, that when accompanied by aggravating circumstances, a breach of contract may violate the Act. *Garlock v. Henson*, 435 S.E. 2d 114, 115 (N.C. App. 1993). To find such aggravating factors, the plaintiff must demonstrate deception in the formation of the contract or in the circumstances of its breach. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). It is difficult to imagine a more clear finding by the jury of substantial aggravating factors. Although the ultimate decision of whether conduct constitutes an unfair trade practice is left to the court, *id.* at 534, the district court abused its discretion in not so finding here.

The district court offered two other reasons to render judgment as a matter of law on this claim. The first alternative basis is that because the court admitted evidence of acts committed by AJ prior to 1988 but instructed the jury not to consider it in determining liability, the jury must have been confused by the instruction and improperly considered

the pre-1988 conduct. There is no basis in the record for this determination by the court. Substantial evidence supports the jury's verdict. Furthermore, the pre-1988 acts should not have been removed from the jury's consideration in the first place. See Section II, *supra.*

**7 The court's second alternative basis for its action on the unfair trade claim was that Tudor had "access to adequate information to enable [it] to ascertain the status of [its] claims against defendants at all times." J.A. 186. presumably, the district court is here referring to the requirement that recovery under the Act is limited to those situations where the plaintiff can show that the plaintiff detrimentally relied on defendant's statement or misrepresentation and suffered actual injury as the proximate result. *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. App. 1990), *review denied,* 402 S.E. 2d 824 (N.C. App. 1990).

The fact that Tudor was aware that AJ was involved in deceptive acts relating to its servicing of the mortgages does not preclude a finding that Tudor nonetheless relied on AJ to remit payments due. Tudor necessarily relied on AJ to perform as required; that Tudor knew of AJ's deception does not make it any less deceptive or unfair. We reverse the district court's grant of judgment as a matter of law on the unfair and deceptive trade practices claim. The jury's verdict will stand.

VI.

The jury returned a verdict finding that AJ owed a fiduciary duty to Tudor by virtue of its role as servicing agent and that AJ breached that duty. The district court found that "these findings are contrary to the weight of the evidence and the applicable law, and they will be set aside." J.A. 181. The district court used the wrong standard in granting judgment as a matter of law on this claim. Judgment as a matter of law shall be granted only if there is

no substantial evidence to support the verdict. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107 (4th Cir. 1991). The trial court used the standard that would permit it to grant a new trial, i.e., that the verdict was against the great weight of the evidence. *Id.* Because there is substantial evidence in the record that AJ owed a fiduciary duty to Tudor, the jury's verdict will stand.

The district court also found that there could be no fiduciary duty in this case because there existed no relationship between Tudor and AJ of special faith, confidence and trust. J.A. 181. The court found that because AJ and Tudor were constantly at odds with each other and because Tudor clearly didn't trust AJ. there could be no fiduciary relationship. The court erred in making this finding.

North Carolina provides that a fiduciary relationship "exists in all cases where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith." *Curl v. Key*, 316 S.E. 2d 272, 275 (N.C. 1984). The duty arises in certain legal relationships, including that of principal and agent, where the agent is charged with the entire management of the principal's affairs. *McNeill v. McNeill*, 25 S.E. 2d 615, 617 (N.C. 1943). The fact that a debtor may not trust his trustee or a child may not trust her guardian ad litem does not destroy the fiduciary's obligation to act in the best interests of its charge. The fiduciary responsibility arises from the special position the fiduciary is in.

**8 AJ is in the special position of managing Tudor's one half interest in mortgages worth over $20 million. AJ has been ordered by the court to account for and service the mortgages on Tudor's behalf. There was substantial evidence that AJ is required in equity and good conscience to act in good faith. The district court erred in overturning the jury verdict for Tudor on its breach of fiduciary duty claim.

VII.

The district court denied Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee. The denial of leave to amend must be based on a showing of prejudice, bad faith, futility or dilatoriness associated with the motion. *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1148 (4th Cir. 1988).

Tudor's argument alleges that the fee agreement underlying AJ's interest in the mortgages is invalid and that AJ's interest therefore invalid. The district court denied leave to amend on the basis of futility. Because the bankruptcy court had already determined in a proceeding involving both Tudor and AJ that AJ acquired its interest in the mortgages as a bona fide purchaser, that issue cannot be relitigated. The identical issue was necessarily determined in a prior action in which the parties were identical to, or in privity with, the parties in the instant action. The issue is therefore collaterally estopped from relitigation. *State v. O'Rourke*, 442 S.E.2d 137, 138 (N.C. App. 1994). The district court properly denied leave to amend the complaint.

VIII.

Tudor argues that its lien granted by the bankruptcy court is a superior lien to AJ's rights under the fee agreement with EMT. Tudor argues that the district court incorrectly denied summary judgment on its motion for declaratory judgment that AJ is limited to one-half of the proceeds from the mortgage payments.

The fee agreement provides that in some years, AJ is entitled to more than half of the mortgage proceeds. As security for the fee agreement, EMT assigned one-half interest in the mortgages to AJ. AJ's interest in the mortgages secures its right to *all* the fees due under the fee agreement. Because its security interest in one-half of the

mortgages does not limit its right to the proceeds to one half; AJ has a right to whatever is due under the fee agreement. Tudor, as successor to EMT, is entitled to the revenues owing EMT on the basis of its one-half interest in the mortgages. In effect, Tudor is bound by the fee agreement between AJ and EMT. The district court committed no error in this regard.

IX.

In the damages phase of the trial, the jury returned a verdict awarding Tudor punitive damages in the amount of $7 million. The district court vacated that award as unconstitutional and alternatively, should that ruling be overturned on appeal, ordered a new trial on punitive damages.

The Supreme Court has made it clear that the jury may not be given unbridled discretion in determining punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Post-judgment review by the trial court may, however, protect a jury award. *Id.* at 22. Interpreting *Haslip*, this court has determined that to protect the constitutionality of a punitive damages award, four so-called *Haslip* factors must be taken into consideration: (1) the relationship of the damages to the harm caused, (2) other penalties for the same conduct, (3) improper profits and plaintiff's costs, and (4) limitations based on defendant's ability to pay. *Mattison*, 947 F.2d at 110. While these issues may be considered by the trial court in a post-trial review in state court proceedings, they must be presented to the jury for prejudgment consideration in federal proceedings. *Id.* at 109.

**9 In *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992), this court determined that a district court, sitting in a state in which the highest court has not yet ruled on its punitive damage procedure in light of the U.S. Supreme Court's pronouncement in *Haslip*, should predict

what the state court would do to ensure the constitutionality of its state scheme. In *Hugo's Skateway*, the district court determined that the state would require consideration of the *Haslip* factors, and therefore required that the factors be included in the jury charge in the federal proceeding.

In the case at bar, Tudor requested the *Haslip* instruction be given to the jury. North Carolina's Supreme Court had not yet ruled on the correct procedure and so the district court was bound by *Hugo's Skateway* to predict what North Carolina courts would do in light of *Haslip*. The determination would have been well-informed by the fact that North Carolina's judicial conference had already published a new jury instruction on punitive damages incorporating the *Haslip* criteria. N.C. Pattern Instruction 810.01. Tudor requested this instruction. AJ objected to its use, arguing that there was no basis in North Carolina law for using the new instruction. The district court agreed with AJ and refused to give the instruction. Upon the jury's award of $7 million, the court determined that the jury had been improperly instructed and that the award was therefore unconstitutional.

The conduct of the defense in this case presents a clear example of invited error. It is "a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party." *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 (11th Cir. 1985). AJ cannot argue against the proper instruction at trial and then argue to set aside the award because the proper instruction was not given.

The district court found that alternatively, a new trial should be given on the issue of punitive damages because the award was so grossly excessive as to shock the conscience. In making that determination, the court was required to balance competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985).

The district court's grant of a new trial is reviewed for abuse of discretion. *Mattison*, 947 F.2d at 108.

The district court ruled

> that having been found guilty of conduct warranting the assessment of punitive damages against it by a competent tribunal, a defendant should not thereafter be liable for punitive damages in another action involving the same conduct.
>
> Finally, there is a feature of the punitive damages procedure which, if it does not render it constitutionally suspect, at least serves to make it morally wrong, and that is the fact that the proceeds of a punitive damages award go not into the public coffers as do all other fines and forfeitures but into the pockets of the successful plaintiff and his attorney.
>
> **10****
>
> This court, of course, will continue to apply the law as best it can be discerned for the sometimes bewildering decisions currently covering the punitive damages field. Were it writing on a clean slate it would have no hesitance in ruling unconstitutional the award of punitive damages in the present case and would simply enter judgment for the defendants on this issue. Instead, the court must state that the award of $7,000,000.00 as punitive damages in this case was shocking to the court's conscience, and in the event the court's ruling on the conversion count is reversed on appeal it must be set aside as grossly excessive and contrary to the weight of the evidence.

J.A. 199, 201. The trial court's admitted prejudice against punitive damages for *any* private plaintiff makes it unlikely that the court actually weighed competing interests to determine that a new trial was necessary to avoid a miscarriage of justice. We find that the district court abused its discretion in ordering a new trial. The punitive damages award will stand.

X.

For the reasons set forth above, we hold as follows:

> (1) we reverse the district court's grant of summary judgment as to all claims for any acts occurring prior to the date of the bankruptcy court's decision, September 14, 1988; (2) we affirm the district court's grant of summary judgment in favor of AJ on Tudor's RICO claim; (3) we reverse the district court's grant of judgment as a matter of law in favor of AJ on the conversion claim, the Unfair and Deceptive Trade Practices Act claim, and the breach of fiduciary duty claim; (4) we affirm the district court's denial of Tudor's motion for leave to amend its complaint to assert the illegality of the finder's fee and its motion for declaratory judgment that AJ is limited to one-half of the proceeds from the mortgage payments; and (5) we reinstate the jury's punitive damage award of $7 million in favor of Tudor.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 28, 2000

No. 99-1990
CA-97-126-5-BR

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E. J. SERVICING, INCORPORATED;
E. J. REALTY MANAGEMENT CORPORATION;
E. J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INCORPORATED; IRA BORN,
Defendants-Appellants,

and

ALAN JACOBS; STANLEY LANE, M.D.;
PETER DAPUZZO; CONSTANCE ROSEN,
Executrix of the Estate of Howard
Rosen, M.D.; RUTH SCHARF,
Defendants.

No. 99-1996

NEW HORIZON OF NY LLC,
Plaintiff-Appellee,

v.

STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of Howard Rosen, M.D.; RUTH SCHARF,
Defendants-Appellants,

and

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E. J. SERVICING, INCORPORATED; E. J. REALTY MANAGEMENT CORPORATION; E. J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INCORPORATED; IRA BORN; ALAN JACOBS,
Defendants.

On Petition for Rehearing and Rehearing En Banc

ENTERED: NOVEMBER 28, 2000

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/Patricia S. Connor
Clerk

Section 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

Section 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain

from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C.A. §1367

Section 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original juris-diction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circum-stances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Added Pub. L. 101-650, Title III, §310(a), Dec.1, 1990, 104 Stat. 5113.

CHAPTER 75.

MONOPOLIES, TRUSTS AND CONSUMER PROTECTION.

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

Added by Laws 1969, c. 833. Amended by Laws 1977, c. 747, §§. 1, 2.

(2)

No. 00-1359

Supreme Court, U.S.
FILED
APR 27 2001
CLERK

IN THE
Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

v.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; and RUTH SCHARF,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 00-1359

IN THE
SUPREME COURT OF THE UNITED STATES

NEW HORIZON OF NEW YORK, LLC

Petitioner,

v.

ROBERT JACOBS; ELLIOT JACOBS;
ALLAN MIRWIS; E.J. SERVICING, INC.;
E.J. REALTY MANAGEMENT CORP.;
E.J. PROPERTY CONSULTANTS; DAVID QUELLER;
DAVID QUELLER, INC.; IRA BORN;
STANLEY LANE, M.D.;PETER DAPUZZO;
CONSTANCE ROSEN, Executrix of the Estate
of HOWARD ROSEN, M.D.; and RUTH SCHARF

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

The Fourth Circuit observed that petitioner initiated and pursued this lawsuit in a United States District Court on the legal theory that "this case was related to cases arising under Title 11." Pet. App. at 13. With respect to jurisdiction, petitioner's complaint alleged only that the district court had jurisdiction over claims based on North Carolina state law under 28 U.S.C. § 1334(b), which confers federal jurisdiction over all "civil proceedings arising under Title 11, or arising or related to cases under Title 11."[1] Whether the petitioner's state-law claims were or were not "related" to a case under Title 11 was the primary jurisdictional issue in the district court and in the court of appeals.

The respondents moved on October 23, 1998, ten days before trial, to dismiss the action for lack of federal subject-matter jurisdiction, and the petitioner, in response, relied primarily on the language of Section 1334(b). Petitioner contended that its claims arose out of and were related to a proceeding under Title 11.

Following the entry of a final judgment, the respondents appealed and the Fourth Circuit, applying its own binding precedent in *In re Celotex Corp.*, 124 F. 3d 619, 625 (4th Cir. 1997), and this Court's language in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-308 (1995), held that there was no federal subject-matter jurisdiction under 28 U.S.C. § 1334(b) on the unique facts of this case. *See* Pet. App. at 14-24. The court of appeals rejected petitioner's contention that the possibility that the respondents were in civil contempt of a bankruptcy court order gave rise to "related to" jurisdiction under Section 1334(b). Pet. App. at 17-22. The Fourth Circuit held that such a civil contempt claim would constitute an impermissible collateral attack on an unappealed order of the bankruptcy court. Hence it could

---

[1] Paragraph 16 of the complaint stated: "This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, as this matter is related to proceedings under Title 11 of the United States Code."

not be the basis for civil claims based on state law in federal court under Section 1334(b). Pet. App. at 19-22. The court of appeals also rejected the other grounds asserted by the petitioner for federal jurisdiction under Section 1334(b). Pet. App. at 22-24.

The primary argument now made in the Petition for a Writ of Certiorari -- i.e., that federal subject-matter jurisdiction existed because this action was, in substance, an action under 18 U.S.C. § 401 "to determine the appropriate remedy for violation of the Confirmed Order" (Pet. 15), and that federal-court jurisdiction over the claims made under North Carolina law is "supplemental" to that contempt action under 28 U.S.C. § 1367 (Pet. 16) -- was not urged in the lower courts. It is a recent formulation of a legal issue designed to generate some interest in this Court. In fact, as we demonstrate below, there is no more merit to this asserted ground for federal jurisdiction than there is to the Section 1334(b) grounds that the petitioner invoked unsuccessfully in the district court and in the court of appeals. But even if this newly crafted issue did present grounds for certiorari, the failure to assert it below forecloses its consideration by this Court at this juncture. *Holly Farms Corp. v. National Labor Relations Board*, 517 U.S. 392, 400 n.7 (1996); *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 (1996).

STATEMENT

Petitioner ("New Horizon") is a limited liability corporation owned by two families and created in 1996 for the purpose of exercising an option under a bankruptcy court reorganization plan. The option was to purchase certain notes relating to apartment properties in Durham, North Carolina, owned by a limited partnership. New Horizon brought the present action in federal court after it exercised the option but did not close on the sale. It sought millions of dollars in damages against certain limited partners who had allegedly interfered with its ability to exercise the option by

appealing to a district court from the bankruptcy court's approval of the reorganization plan that included the option.

The limited partners who were sued by New Horizon -- who are respondents in this Court -- claimed, *inter alia*, that their appeal to the district court was objectively valid and was, therefore, constitutionally shielded against damage liability by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 743 (1983).

The district court denied pretrial motions for summary judgment and to dismiss the complaint for lack of federal subject-matter jurisdiction. The case proceeded to trial before a jury on various North Carolina breach-of-contract and tort claims growing out of New Horizon's alleged inability to exercise the option. The jury returned a verdict awarding compensatory damages of $6,491,835. The award was trebled under the North Carolina unfair and deceptive trade practice law for a total in excess of $22 million.

On appeal, the Fourth Circuit held that there was no federal subject-matter jurisdiction over New Horizon's claims because even if New Horizon's claim is related "in the ordinary sense of the word" (Pet. App. at 15, n.16) to the bankruptcy proceedings in the Eastern District of North Carolina, the claims did not "conceivably have any effect on the estate being administered in bankruptcy," as is required under this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995), to create federal subject-matter jurisdiction. Pet. App. at 15. The damage judgment was therefore vacated by the court of appeals because the court below concluded that the "outcome" of New Horizon's complaint could not "alter the debtor's rights, liabilities, options or freedom of action (positively or negatively)" and the petitioner's claims did not "impact upon the handling and

administration of the bankrupt estate." Id. After the Fourth Circuit's decision, New Horizon initiated a substantially identical action in the North Carolina state courts. *New Horizon of NY LLC v. Elliot Jacobs, et al.*, General Court of Justice, Superior Court Division, Durham County, N.C., No. 00-CVS-05182.

REASONS FOR DENYING THE WRIT

I.

THE PRIMARY ISSUE NOW URGED BY THE PETITIONER WAS NOT PRESENTED TO OR DECIDED BY THE LOWER FEDERAL COURTS

The first question presented in the petition is based on the "district court's federal question jurisdiction over a claim for contempt of court." The petition asserts that the North Carolina contract and tort claims made by New Horizon in the United States District Court for the Eastern District of North Carolina were within the subject-matter jurisdiction of the federal court because they were "supplemental" or "pendent" to the "claim for contempt of court." Pet. at 15-17. This is a substantial reconfiguration and revision of the jurisdictional ground asserted by New Horizon in the lower courts.

The New Horizon complaint invoked federal subject-matter jurisdiction solely under 28 U.S.C. § 1334(b), on the alleged ground that New Horizon's claims were "related" to proceedings under Title 11. See note 1, *supra*; Pet. App. at 14. To be sure, New Horizon also alleged in paragraphs 53-55 of its complaint that the actions of the defendants constituted "contempt of the United States Bankruptcy Court through the knowing, willful and contumacious violation" of the order entered by the bankruptcy court confirming the reorganization plan. That same order had, according to the complaint, been tortiously appealed to the district court. The

civil contempt was not alleged, however, to be the basis for federal subject-matter jurisdiction. It was only alleged as grounds for additional penalties or sanctions against the respondents.

The district judge ruled on the civil contempt claim after the jury returned its verdict on the state-law claims, and he rejected the civil contempt claim. Pet. App. at 28-34. New Horizon did not appeal from that ruling.

The first ground asserted by the respondents in their appeal to the Fourth Circuit was that the federal court lacked subject-matter jurisdiction. New Horizon gave the jurisdictional issue short shrift in its brief in the court of appeals. It asserted in its brief that "federal subject-matter jurisdiction over this case cannot reasonably be disputed." Brief for Appellee, 4th Cir. Nos. 99-1990, 99-1996, p. 70. The argument made in New Horizon's brief related only to Section 1334(b). New Horizon argued that the case "presents numerous questions of bankruptcy and federal law." *Id.* at p. 71. New Horizon did not argue -- and the Fourth Circuit did not decide -- the "supplemental" or "pendent" jurisdiction issue that is now being asserted for the first time in New Horizon's petition for a writ of certiorari.

The opinion of the court of appeals also demonstrates that "supplemental" or "pendent" jurisdiction over state claims was never argued to the court of appeals. The Fourth Circuit describes the relevance of New Horizon's civil contempt claim to its jurisdictional argument as follows (Pet. App. at 19; emphasis added):

> Thus, it is patent that the civil contempt count, *on which New Horizon bases its claim in this case of related to jurisdiction under § 1334*, is nothing more than a collateral attack on the order of the bankruptcy court of February 6, 1997.

The court of appeals did not discern in New Horizon's arguments any contention that there was "supplemental" or

"pendent" jurisdiction over North Carolina state-law claims growing out of the allegations of civil contempt. The only relevance of the civil contempt allegations was as a basis for "related to jurisdiction under § 1334." Pet. App. at 19.

Under long-standing principles articulated by this Court governing the grant of certiorari, legal issues that have not been argued or decided by the lower federal courts are not properly before this Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

II.

THE RESULT REACHED BY THE FOURTH CIRCUIT IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER CIRCUIT

A. The First Question Presented

As indicated above, the first question presented in the Petition for Certiorari was never raised or decided below. In any event, the position urged by New Horizon is erroneous. New Horizon acknowledges that "[t]he district court ultimately ruled against Horizon on the contempt of court claim." Pet. at 15. But it argues that the mere inclusion of this claim in its complaint justified a full jury trial in a federal court on various state claims on the basis of "supplemental" or "pendent" jurisdiction.

New Horizon does not take issue, however, with the conclusion of the district court (Pet. App. at 28-34) that rejected New Horizon's civil contempt claim. The district court concluded that there was no violation by the respondents of any "specific and definite order." Pet. App. at 32. New Horizon did not appeal that decision. And the court of appeals also noted that the order of the bankruptcy court dated February 6, 1997 -- which had initially denied

New Horizon's motion to hold the respondents in contempt (Pet. App. at 11, 18) -- had also not been appealed. New Horizon's federal-court lawsuit was, therefore, "a collateral attack on a final order of the bankruptcy court." Pet. App. at 17. Hence the Fourth Circuit correctly concluded "that the jurisdictional base for the case should not be permitted to stand on a collateral attack which has been forbidden by two decisions of the Supreme Court." Pet. App. at 18.

The petition does not contend -- nor could it -- that given the rejection of New Horizon's civil contempt claim, there was any "judicial economy" or preservation of judicial resources in trying the state-law claims in a federal court. This is particularly true since the damage claims were to be tried to a jury and the civil contempt claim was to be tried to a judge. The petition argues only that the Fourth Circuit's decision in this case is inconsistent with other decisions of the Fourth Circuit. *See* Pet. at 16-17. An intra-circuit split of this kind is not a ground for the exercise of this Court's certiorari jurisdiction. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *see also Davis v. United States,* 417 U.S. 333, 340 (1974).

B. The Second Question Presented

The court below held that New Horizon's claims were not "related to a bankruptcy case" within the meaning of 28 U.S.C. § 1334(b) because the term "related" in this jurisdictional provision is limited to situations in which the "outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pet. App. at 15, 22, quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), approved by this Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995). Since New Horizon was not a debtor or creditor in the bankruptcy proceedings and was not seeking enforcement of any order that would enlarge or diminish the bankrupts' estates, its

lawsuit did not qualify under the "related to" provision of 28 U.S. C. § 1334(b). As the Fourth Circuit observed, the New Horizon claims were "completely unrelated to the sale of the wrap notes or the administration of the bankruptcy estates." Pet. App. at 23. The damages that were awarded by the jury were to be paid by individuals who were not debtors or creditors in the bankruptcies and the putative recovery would not benefit either bankrupt estate. By the time New Horizon filed its case, the notes were no longer even possessed by either bankrupt estate. Nor could the verdict in New Horizon's case have affected the notes or their ownership in view of the nature of New Horizon's claims. In these circumstances, New Horizon's claims were not within the subject-matter jurisdiction of the federal court under Section 1334(b).

The petition does not state or suggest that the Fourth Circuit's decision on this issue conflicts with a decision of this Court or of any other Circuit. Indeed, the result reached by the court below is patently mandated by this Court's *Celotex* decision and by the Third Circuit's holding in *Pacor*, which has been universally followed.

Moreover, the Fourth Circuit's decision follows a long line of precedent. Courts considering this jurisdictional issue have consistently held that the "related to" language of Section 1334(b) is not satisfied if a judgment could not affect the bankrupt's estate. In *Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987), for example, Circuit Judge Easterbrook wrote for a unanimous panel that the "related to" jurisdiction of Section 1334(b) may be invoked only when the dispute "affects the amount of property available for distribution or the allocation of property among creditors." The Court of Appeals for the Eleventh Circuit observed in *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11th Cir. 1990), that "[o]verlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." *See also Specialty Mills, Inc. v. Citizens*

State Bank, 51 F.3d 770 (8th Cir. 1995) (no federal jurisdiction even though the state-law claims "arose from [the defendant's] conduct in the Dakota Oat bankruptcy"); *In re Dow Corning Corp.*, 86 F.3d 482, 492 (6th Cir. 1996); *Matter of Zale Corp.*, 62 F.3d 746, 752 (5th Cir. 1995); *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987); *In re JMP–Newcor International, Inc.*, 225 B.R. 457 (Bankr. N.D. Ill. 1998); *In re Import & Mini Car Parts, Ltd.*, 200 B.R. 857 (Bankr. N.D. Ind. 1996); *In re Leeds Building Products, Inc.*, 160 B.R. 689 (Bankr. N.D. Ga. 1993); *In re Annapolis Mall Motel Ltd. Partnership*, 140 B.R. 105, 107 (N.D. Md. 1991).

The petition asserts erroneously that the federal court had subject-matter jurisdiction when the case was commenced, and it argues that subsequent events did not divest the federal court of such jurisdiction. Pet. at 19. But from its inception, the action brought by New Horizon for damages could not affect the allocation of property among creditors or the size of the bankrupt estates. The events recited in the Fourth Circuit's opinion that occurred after inception of New Horizon's action were not invoked as a ground to withdraw federal subject-matter jurisdiction that had previously attached. They were described only to demonstrate that the events that actually transpired proved what was obvious from the face of New Horizon's complaint -- i.e., that the claims made in the complaint would not enlarge or diminish the bankrupt estates.

III

THIS CASE PRESENTS NO RECURRING ISSUE OF IMPORTANCE

Finally, the petition does not describe how the jurisdictional issue presented by the unique circumstances of this case could affect other situations. To our knowledge, this is the first recorded case of an action brought in any court seeking to hold parties liable for appealing a bankruptcy court decision to a district court. Such an appeal is ordinarily a constitutional and statutory right that cannot give rise to civil liability. *See* p. 4, *supra*. Petitioner does not contend that there are likely to be many such cases. Indeed, the issue that the Fourth Circuit did not reach and that is presently pending in the North Carolina state court -- i.e., whether civil liability may constitutionally attach to the pursuit of an objectively valid appeal -- should, in most if not all cases, prevent a recurrence of the claim that was made here by New Horizon. And, in any event, petitioner has now filed its claim in the North Carolina state courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 2001

(3)

No. 00-1359

Supreme Court, U.S.
FILED
MAY 7 2001

In The

Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

vs.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; RUTH SCHARF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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In Respondents' Brief in Opposition to the Petition for Writ of Certiorari, several new matters are presented to which the Petitioner is entitled to reply.

I. Federal Question Jurisdiction for Contempt of Court and Supplemental Jurisdiction for Pendent State-Law Claims Were Properly Presented to the Lower Court.

Respondents argue in their Brief (pp. 5-8) that Petitioner failed to present its claim for contempt of court and supplemental jurisdiction as a basis for federal jurisdiction in the courts below. This contention is incorrect. As acknowledged by Respondents, New Horizon's complaint included a separate and independent count for civil contempt, alleging the knowing, willful, and contumacious violation of the Order of the Bankruptcy Court. This claim sought the full measure of damages and was not, as Respondents would characterize it, "only alleged as grounds for additional penalties for sanctions against the Respondents." (Brief at p. 6)

The civil contempt claim survived multiple motions to dismiss and for summary judgment. During the course of these motions, New Horizon argued that the civil contempt count provided a basis for the "exclusive jurisdiction" of the trial court. (See "Plaintiff's Opposition to Motion to Dismiss for Subject Matter Jurisdiction," Supplemental Appendix at pp. 12-13.) The trial judge denied all of Respondents' motions and heard evidence relating to the contempt claim during the jury trial and then heard an additional day of evidence with regard to the contempt claim after the jury trial concluded. Six months after the trial ended, the trial judge ultimately ruled that even though the Defendants had committed "egregious" acts which "may be deserving of punitive sanctions," there was insufficient proof that Defendants had violated a specific order of the Bankruptcy

Court. (See Order of the Honorable W. Earl Britt, Appendix p. 34.)

On appeal, the Respondents did not address the contempt of court claim with regard to the jurisdictional argument in their initial brief and instead focused solely on the issue of "related to" jurisdiction under 28 U.S.C. § 1334(b). In its response brief, New Horizon likewise focused its argument on "related to" federal subject-matter jurisdiction, but also mentioned in several places the fact that one of the counts being tried before the district court was civil contempt of court.

At oral argument on June 6, 2000, the Fourth Circuit panel specifically inquired of counsel for New Horizon as to whether or not New Horizon contended that there was supplemental or pendent jurisdiction over state law claims which would be associated with the contempt claim. Counsel responded that New Horizon was, indeed, so contending. On June 12, 2000, counsel for New Horizon filed a supplemental document with the Fourth Circuit pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, which Rule expressly permits citation to pertinent and significant authorities "after oral argument but before decision." A copy of this supplemental filing is included in the Supplmental Appendix at pp. 18 - 105. The supplemental filing directly addressed New Horizon's contention that the contempt claim provided an independent basis for federal question jurisdiction and the basis for pendent jurisdiction over state law claims. Counsel noted that these issues had been raised during the course of oral argument. On June 23, 2000, counsel for the Respondents filed a response to Petitioner's June 12 supplemental filing, citing two cases regarding the jurisdictional issue. (See Supplemental Appendix at pp. 106 - 108.)

Nonetheless, in spite of raising it at oral argument, the Fourth Circuit panel ignored this additional basis for jurisdiction, which was both briefed and argued. The opinion of the Fourth Circuit does not address federal

question jurisdiction over the contempt of court claim and supplemental jurisdiction for the state-law claims. On November 14, 2000, New Horizon filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. (See Supplemental Appendix at pp. 109 - 130.) The Petition addressed the failure of the Fourth Circuit to consider contempt of court and supplemental jurisdiction. The Fourth Circuit ignored these arguments and denied the Petition for Rehearing. (Appendix p. 80)

Thus, this jurisdictional argument was appropriately presented and highlighted to the Fourth Circuit. A close examination of Respondents' arguments on this issue reveals that there is no substantive basis upon which they can contest it. It is clear that a federal court has original jurisdiction over a claim for civil contempt of its own order. It is also clear that the federal court has subject matter jurisdiction over state law claims arising out of the exact same nucleus of operative facts. This tenet has been well-settled since *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and has been subsequently codified in 28 U.S.C. § 1367(a).

Finally, Respondents highlight in their Brief that the Fourth Circuit found that the contempt claim was "a collateral attack on a final order of the Bankruptcy Court" – implying that the claim should have been dismissed on that basis in the trial court. (Brief at p. 8) This finding, however, made for the first time on appeal, cannot and should not retroactively deprive the trial court of subject matter jurisdiction over the entire case. Whether or not the contempt claim was ultimately sustained at trial or thereafter does not determine the Court's original or supplemental jurisdiction. It should be noted that because the trial judge ultimately denied the contempt claim, it was never brought forward on appeal and never briefed on its merits in the Fourth Circuit. Thus, the Fourth Circuit devised its characterization of the "collateral attack" effect of the contempt claim without the benefit of any briefing by any of the parties. Even if the Fourth Circuit's conclusions about

collateral estoppel are correct (which Petitioner disputes), such conclusions regarding the legal merits of the federal contempt claim would not have the effect of depriving the trial court of its supplementary jurisdiction over the state-law claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L.Ed.2d 720 (1988); *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S. Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970); *Shanaghan v. Cahill*, 58 F.3d 106, 109-10 (4th Cir. 1995); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993).

II. Respondents Misstate the Facts Presented Below with Regard to "Related To" Bankruptcy Jurisdiction.

Respondents state as follows:

> By the time New Horizon filed its case, the notes were no longer even possessed by either bankrupt estate. Nor could the verdict in New Horizon's case have affected the notes or their ownership in view of the nature of New Horizon's claims.

Respondents' Brief at p. 9. These statements are untrue and reflect a misunderstanding of the evidence presented at trial and New Horizon's claims.[1] New Horizon filed its lawsuit in February 1997. The promissory notes were then possessed by the Tudor bankruptcy trustee, who was actively marketing them for sale to the highest bidder inasmuch as the exclusive option to purchase by New Horizon had just

[1] Appellate counsel for Respondents did not participate in the trial below.

expired. As noted in the Petition for Writ of Certiorari (pp. 13-14), numerous arguments were being made by the Petitioner and Respondents at the time of filing of the lawsuit as to the validity of the Plan of Reorganization, the interpretation of the Plan of Reorganization, and the propriety of New Horizon as a potential purchaser of the notes. Any of these matters could have affected the sale of the notes, the ownership of the notes, and the purchase price of the notes, which would ultimately be the primary source of funding for the Bankruptcy Plan. Thus, the Fourth Circuit's decision in fact contravenes the numerous cases from other circuits recited by Respondents in their Brief (at pp. 9-10) including *Matter of Xonics, Inc.*, 813 F.2d 127 (7th Cir. 1987) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). There can be no doubt that as of the date of filing of the lawsuit, the New Horizon dispute "could conceivably have ... effect" on the amount of property available for distribution to creditors and the allocation of assets among creditors. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995).

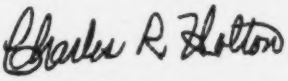
CONCLUSION

The Fourth Circuit's decision wrongfully ignores basic principles of pendent and supplemental jurisdiction which have been well-established by statute and by this Court for many years. The decision is an aberration which should not be permitted to stand as new precedent limiting federal jurisdiction over pendent state-law claims. Similarly, the Fourth Circuit's decision ignores the broad statutory jurisdictional grant given by 28 U.S.C. § 1334(b) over matters related to bankruptcy cases as well as the broad standards for judicial application of § 1334(b) established by this Court in *Celotex Corp. v. Edwards*, *id.* The precedent of withdrawal of federal jurisdiction over matters clearly arising out of and related to bankruptcy cases and requiring those matters to be litigated in state court while the bankruptcy

cases are being actively administered, could result in significant chaos and interfere substantially with the ability of federal courts to enforce and police their Orders and Plans.

Wherefore, Petitioner New Horizon of New York LLC requests the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted, this 7th day of May, 2001.



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No.:5:97-CV-126-BR(2)

NEW HORIZON OF NY LLC,	)
Plaintiff,	)
v.	)
ROBERT JACOBS, et al,	)
Defendants.	)

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FOR SUBJECT MATTER JURISDICTION AND PLAINTIFF'S MOTION FOR SANCTIONS AND MEMORANDUM IN SUPPORT

The Plaintiff, New Horizon of New York, LLC, ("New Horizon"), by and through counsel, submits this Opposition to Defendants Robert Jacobs, Elliot Jacobs, Allan Mirwis, E.J. Servicing Inc., E.J. Realty Management Corp., and E.J. Property Consultants' ("Defendants") Motion to Dismiss For Lack of Subject Matter Jurisdiction, and moves the Court to impose sanctions against the Defendants for filing this frivolous and delaying motion.

PRELIMINARY STATEMENT

On March 18, 1997, these Defendants filed a motion requesting this Court to refer this matter to the bankruptcy court for determination.[1] This Court entered its order of referral on June 20, 1997, pursuant to the August 3, 1984 Standing Order. The same Defendants now move to dismiss this case for lack of subject matter jurisdiction, ten calendar days before trial is to begin. Defendants contend that they had heretofore assumed this case was "related to" a case arising under Title 11 "because they wanted to have this case referred to Bankruptcy Court, believing that court would be the forum most favorable to a plea of *res judicata*." (Defendants' Memorandum at 2). Though the bankruptcy court initially ruled against the Defendants on their *res judicata* allegations (discussed more fully, infra) in August 1997, Defendants have unjustifiably waited until one week before trial to challenge this Court's jurisdiction. It is evident that the Defendants agreed there is subject matter jurisdiction when it was convenient, and raise this issue now only in a last-ditch effort to delay the trial. The motion is without merit and must be dismissed and sanctions imposed.

FACTS

This case has evolved from the bankruptcy proceeding of AJ & AJ Servicing, Inc., a corporation owned by the Jacobs Group of Defendants, many of whom are the moving Defendants with respect to this motion. AJ & AJ Servicing filed bankruptcy after several judgments were entered, totaling over $13 million, against it and other individuals related to the corporation.

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[1] In the first motion, Defendants argued that this Court needed to dismiss the action because it was "related to" a bankruptcy proceeding.

After several years of extensive proceedings and negotiations, all the parties to the bankruptcy reached a settlement and compromise, which was approved by the Bankruptcy Court and incorporated into the terms of the Plan of Reorganization. On September 26, 1996, Judge Leonard entered the Order Confirming Plan in the AJ bankruptcy. Several portions of the Plan are relevant to this action: First, the judgments entered against the Jacobs Group were to be vacated shortly after confirmation. Second, title to certain wraparound mortgage notes held by AJ was to be transferred to another bankruptcy debtor, Tudor II. Following that conveyance, Tudor II was to grant an option to purchase the wraparound notes to New Horizon of NY, LLC, the Plaintiff herein. The provisions of the option were attached as letter agreements to the Plan of Reorganization, and incorporated into the Plan through the Order Confirming Plan. In addition, the limited partner Defendants received certain other benefits from the Plan of Reorganization.

Following the confirmation of the Plan, the Defendants proceeded to receive the benefits imparted to them under the Plan, including the vacation of the judgments, the extension of the mortgage under the wrap notes, and others. At the same time, however, the Defendants took steps (including the institution of a baseless appeal to this Court, the purpose of which was to hinder financing and closing on the option) to sabotage the benefits conferred upon New Horizon, as more fully set forth in the Amended Complaint, the Pretrial Order, and the Plaintiff's Memorandum of Authorities on Contested Issues of Law.

Plaintiff's contentions in this lawsuit are that the Defendants' efforts to sabotage certain elements of the Plan (1) breached the Plan of Reorganization, which is a contract under the law, (2) tortiously interfered with the option agreement entered into between Tudor II and New Horizon; (3) constitute civil contempt of the court's Order confirming

the plan of reorganization; (4) constitute abuse of process; (5) amount to malicious prosecution; and (6) are unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes. In addition, Plaintiff contends that these acts subject Defendants to treble and/or punitive damages. Plaintiff also contends that the Defendants committed a fraud on the Bankruptcy Court, by consenting to the Plan (some of them specifically appearing in Court and making representations to the Court, others by their consent through their agents), while secretly harboring opposition to the benefits going to New Horizon and an intent to undermine the benefits.

The issues involved in this case go to the very integrity of the bankruptcy proceeding, to the integrity of the Orders entered by this and the Bankruptcy Court, and to the abusive misuse of federal court proceedings, and must be resolved by this Court.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. This Case Arises Out Of Or Relates To A Proceeding Under Title 11.

Title 28 U.S.C. § 1334(b) grants jurisdiction to the district courts over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters within the Bankruptcy estate." Celotex Corp. v. Edwards, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995) (citing Pacor, Inc. v.

Higgins, 743 F.2d 984 (3d Cir. 1984)). The "related to" language gives district courts and bankruptcy courts "jurisdiction over more than simple proceedings involving the property of the debtor or the estate." Id. Indeed, this Court has already ordered that "this matter is related to cases having arisen under Title 11" in conjunction with the ***Defendants***' motion to refer the case to the bankruptcy court. June 20, 1997 Order of Referral. In addition, all counsel agreed that the bankruptcy court has jurisdiction in the Joint Preliminary Conference Report of October 1997 (after Judge Leonard denied the 12(b)(6) motion), and Judge Leonard found that the bankruptcy court has jurisdiction in his September 9, 1998 Order denying Alan Jacobs' motion for summary judgment.

As noted above, the very integrity of the orders of this Court, the bankruptcy court and the bankruptcy proceedings, as well as the proceedings of this Court, are at issue here. The question to be addressed by the jury and this Court is whether parties to a bankruptcy can consent to a Plan, take their benefits, and seek to undo the benefits to others though the use of the appellate process, among other tactics. This case also revolves around an appeal taken to this Court, the abuse of this Court's and the bankruptcy court's procedures, and this Court's dismissal of the appeal. If this Court does not have jurisdiction to hear these matters, it renders the bankruptcy procedure meaningless and provides a forum for abuse, as the court's orders could never be adequately enforced and this Court's procedures could not be adequately protected.

The Fourth Circuit has adopted the Third Circuit test set forth in Pacor for determining the existence of "related to" jurisdiction. It provides

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

In re Celotex Corp., 124 F.3d 619, 625-626 (4th Cir. 1997) (citing Pacor, 743 F.2d at 994).

Because the debtor is not a party to this adversary proceeding, Defendants wrongly assert that the outcome of this proceeding could not conceivably have any effect on the estate in bankruptcy. This assertion, along with all other arguments made by the Defendants related to this motion, ignores the Plaintiff's contention that the Defendants are in contempt of the bankruptcy court's Confirmation Order of September 26, 1996. Under the broad contempt powers given to the courts, one of the conceivable remedies this Court might grant is to undo part or all of the Plan. Because the Pacor test "does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action . . . [but only] ***the possibility*** of such alteration or impact," the fact that this remedy is conceivable is sufficient to confer jurisdiction on this Court. See Celotex, 124 F.3d at 626 (emphasis added). See also In re Titan Energy, Inc., 837 F.2d 325, 330 (8th Cir. 1988) ("[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test articulated in Pacor.").

Defendants also contend that this is an action "seeking damages for alleged post-confirmation breach of post-confirmation rights . . . [with] no relation to the bankruptcy or the administration of the estate." Defendants' Memorandum at 9. Thus, according to the Defendants, this Court has no bankruptcy subject matter jurisdiction. In a case remarkably similar to the one at bar, the United States District Court for the District of Utah found that the bankruptcy court did have subject matter jurisdiction over an agreement between a creditor and a third party, where the agreement was attached to and approved as part of the debtor's Chapter 11 plan. In re Terracor, 86 B.R. 671 (D. Utah 1988). See also In re Greenley Energy Holdings of Pennsylvania, Inc., 110 B.R. 173, 184 (Bankr. E.D. Pa. 1990), cited by Defendants at p. 10, acknowledging that had the agreements at issue been attached or referenced in the plan, it might bring their interpretation within the jurisdiction of the court; In re Coastal Petroleum Corp., 142 B.R. 177, 180-181 (Bankr. N.D. Ohio 1992), cited by Defendants at p. 13, noting that the agreement in suit was not part of the confirmed plan.

In Terracor, the debtor, one of Utah's largest real estate developers, filed a chapter 11 bankruptcy after a major creditor (Senior) sued Terracor and its subsidiaries in numerous jurisdictions, with a claim of over $118,000,000.00. Part of the chapter 11 plan provided that upon confirmation, the debtor would transfer all of certain property to Senior in return for cash advances and a reduction in Senior's claim. Thereafter, the debtor would have no further interest in or responsibility for that property. In fact, the property was transferred to the creditor as required by the plan. Id. at 674.

The plan also incorporated by exhibit a separate contract, "which complimented and clarified the Plan" and was executed by several of the parties. Id. The agreement essentially provided that a portion of the property be

transferred from the debtor to Senior, and then later transferred to an identified third party. The agreement provided that all disputes were to be resolved pursuant to the laws of the State of Colorado, and also provided that upon confirmation of the plan, letters of credit were to be given to the third party who was ultimately to hold the property. Id. Subsequent to the confirmation of the plan, nothing occurred for almost five years after confirmation, at which time the third party filed a motion to order performance of the chapter 11 plan, requesting that the court order the creditor to convey the property as set forth in the plan and agreement. The creditor then filed a motion to dismiss for lack of subject matter jurisdiction. Id. at 673-374.

The court found that the interpretation of the agreement would be under state law, that the agreement was an attachment to the plan, and was a self-contained document relating to the real property transferred from the debtor at confirmation. "As an attachment, the Agreement did concern the Plan, but now the resolution of these disputes will not effect the reorganized debtor. This is only a dispute between Senior and [the third-party recipient]." Id. at 675. The court, however, found that it did have jurisdiction over the dispute. The court noted first that "jurisdiction extends over post-confirmation proceedings regarding rights arising under the confirmed plan." Id. (citing In re Fortner Oilfield Services, Inc., 49 B.R. 9, 10 (Bankr. N.D. Texas 1984)). The court further noted that the court could direct any party to perform any act necessary for the consummation of the plan under 11 U.S.C. § 1142. Id. The court disagreed with Senior's interpretation of that statute (that it would not confer jurisdiction), holding that "the clear intent of section 1142(b) is for the court to retain its jurisdiction to assure that the terms and provisions of the confirmed Chapter 11 Plan are carried out until the Plan is completed and a final decree is entered closing the case." Id. at 675-676.

The court also noted that the plan itself retained jurisdiction in the bankruptcy court, thus providing an additional basis for the finding that subject matter jurisdiction does exist. The court further noted that the creditor disputing subject matter jurisdiction "was an active participant in the confirmation process and Senior has at least impliedly consented to the retention of this court's jurisdiction as set forth in the Plan." Id. at 676.

Finally, the court held that

> the issues raised by the parties appear to be, in part, proceedings that request this Court to interpret provisions of the Plan confirmed by this court. The enforcement or interpretation of plan provisions are integral to the bankruptcy case. Any matters which this court could be called upon to decide in interpreting the intent of the parties in the formulation of the Plan, would require retention of this Court's jurisdiction. ***The court always retains jurisdiction to review and interpret its own orders.***

Id. at 677 (emphasis added).

The issues in the Terracor case regarding subject matter jurisdiction are nearly identical to those raised here, in that both cases involve the interpretation of agreements attached to and incorporated as part of the plan, though the agreements may not specifically deal with property of the estate. In both cases, the debtor conveyed the property as required, and the dispute involves the subsequent conveyance of the property to a third party. In both cases, the parties consented, through their consent to the Plan, to the bankruptcy court's continuing jurisdiction. The distinction in this case is in New Horizon's favor; that is,

New Horizon has a cause of action for contempt based on the Defendants' sabotaging the closing on the option purchase, as set forth in the AJ Plan.[2] Thus, there are federal issues involved, and not simply interpretation of state laws and state torts,[3] which also distinguishes this case from those cited by Defendants, Matter of Leeds Bldg. Products, Inc., 160 B.R. 689, 691 (Bankr. N.D. Ga. 1993) (court notes no question of bankruptcy law involved), and In re H&L Developers, Inc., 178 B.R. 71, 76 (Bankr. E.D. Pa. 1994) (complaint asserted no bankruptcy or other federal law claims).

In addition, the AJ Plan had not been fully consummated in February 1997, when this action was filed. In fact, the sale of the notes was integral to the funding of the Plan, which did not occur until September 1997. If the "related to" jurisdiction existed at the time this action was filed, subsequent transactions effectuating the Plan do not divest this Court of jurisdiction. See In re Celotex Corp., 124 F.3d 619, 626 (4th Cir. 1997); See also Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428, 111 S. Ct. 858, 859, 112 L. Ed. 2d 951 (1991) (if a federal court possesses subject matter jurisdiction over an action at the time it is commenced, a subsequent event cannot divest the court of that subject matter jurisdiction).

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[2] Here, there are numerous questions of bankruptcy and federal law, including the effect of a bankruptcy plan, the interpretation of the plan, an understanding of the alignment of parties in a bankruptcy proceeding and an appeal from an order of the bankruptcy court, and contempt, among others.

[3] Though the Terracor court found that it did have subject matter jurisdiction, it permissibly abstained from hearing the dispute. Abstention would not be appropriate in this case, as, first, the Defendants have not moved for abstention; and second, abstention is only appropriate upon "timely motion," presumably something more than 10 days before trial. 28 U.S.C. § 1334(b)(2).

B. The Bankruptcy Court Retained Jurisdiction In The Plan.

On September 26, 1996, the Bankruptcy Court confirmed the Chapter 11 Plan of reorganization of AJ & AJ Servicing, Inc. Article XIV of the Plan provides specifically for the bankruptcy court's retention of jurisdiction for "including, but not limited to, the following purposes:

* * *

> (e) To enforce and interpret the terms and conditions of this Plan in each and every respect and to issue such orders, including injunctions, as may be necessary to enforce the Plan; To resolve and determine all questions and disputes regarding interpretation of the Plan; and to implement the Plan.
>
> * * *
>
> (j) To determine all disputes, controversies, conflicts, and adversary proceedings, whether or not subject to action pending as of the Confirmation Date.

Clearly, the court retained jurisdiction over interpretation of the Plan. Several of the Plaintiff's causes of action require interpretation of the provisions of the Plan; specifically, whether the Defendants were prohibited from taking actions to interfere with the Plaintiff's receipt of the benefits it was to receive thereunder.

The court's retained jurisdiction extends to "such complementary and auxiliary jurisdiction of the court to protect its original confirmation decree, prevent interferences with the execution of the plan, and otherwise aid in its operation." North American Car Corp. v. Peerless Weighing & Vending Machine Corp., 143 F.2d 938, 940 (2d Cir. 1944) (citation omitted). Certainly actions arising out of parties' attempts to sabotage elements of the Plan fall within the clearly retained jurisdiction of the bankruptcy court.

C. This Court Must Hear Plaintiff's Claim for Contempt.

One of Plaintiff's causes of action is Defendants' civil contempt of the September 26, 1996 Confirmation Order. Federal courts have exclusive jurisdiction over contempt proceedings of their own orders.[4] However, the district court may hear a contempt proceeding as it relates to a bankruptcy order: an order of the bankruptcy court is an order of both courts, as the bankruptcy court is a "unit" of the district court.[5] See United States v. Guariglia, 962 F.2d 160,

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[4] Contempt of a confirmation order can be a cause of action in a civil suit. See Turner v. Mellon Mortgage Co. (In re Turner), 221 B.R. 920 (Bankr. M.D. Fla. 1998).

[5] It is interesting to consider the Defendants' various allegations regarding the jurisdiction of the courts over the contempt issue; in their appeal from Judge Leonard's summary judgment order they contend that only Judge Leonard could rule on contempt of his order, and that his referral to this Court for further consideration after the facts are developed at trial was error. Now, they contend that this Court has no jurisdiction because it is not "related to" a bankruptcy proceeding, which, obviously, would also divest the bankruptcy court of jurisdiction. This is the typical doublespeak that these Defendants have adopted in their desperate attempts to avoid facing trial next week.

162-63 (2d Cir. 1992). Obviously, based on the Plaintiff's contempt cause of action, this Court has not only permissive jurisdiction, but also exclusive jurisdiction.

Defendants contend that this Court should dismiss the contempt cause of action, as Judge Leonard determined the contempt issue on February 3, 1997. This is at least the fourth time that the Defendants have raised this issue in this case. First, this was the subject of their Rule 12(b)(6) Motion, on which Judge Leonard ruled in August 1997. At that time, he conclusively determined that he had not considered the contempt issue, and there was no *res judicata*. Defendants again raised the *res judicata* issue in their summary judgment motions and in their motions to continue. In fact, the *res judicata* in this case is that the contempt issue has not yet been ruled upon. Defendants' continuing to raise this issue is in blatant disregard of the orders already entered in this case, and may itself be contempt.

The Defendants continue to mischaracterize Judge Leonard's ruling on February 3, 1997. In his order, Judge Leonard refused to extend the option period, finding that North Carolina option law would not allow an equitable extension, no matter what the cause of the failure to close. As a result, he never reached the question why the option failed, and did not address the motion for contempt. Judge Leonard's August 5, 1997 ruling clearly states "***the court never considered the allegations underlying the contempt motion and did not adjudicate it,***" (emphasis added), and Judge Leonard has repeatedly noted that an issue not actually considered cannot form the basis of *res judicata*. Thus, the Plaintiff's claim of contempt remains. As a result, this Court has subject matter jurisdiction over the contempt claim, and must retain jurisdiction over this matter.

II. DEFENDANTS SHOULD BE SANCTIONED FOR FILING YET ANOTHER DELAYING MOTION.

Since Defendants' counsel filed their Notice of Appearance on September 11, 1998, in addition to this motion,[6] they have employed the following tactics to delay the trial of this matter and to distract counsel for the Plaintiff from preparing for trial, among others not listed:

- On September 14, 1998, they filed a Motion To Continue certain hearings scheduled for September 18, 1998, which had previously been continued from August 24, 1998 to accommodate the substitution of counsel, necessitating a lengthy opposition.
- On September 16, 1998, Defendants purported to subpoena the custodian of records of Moore & Van Allen, PLLC, seeking all of Moore & Van Allen's bills and invoices related to this matter, necessitating a Motion to Quash and for Protective Order.
- On September 30. 1998, Defendants filed three separate Notices of Appeal from Judge Leonard's interlocutory Order of September 23, 1998 denying all motions for summary judgment related to Jacobs Defendants (except Alan Jacobs), requiring Plaintiff to file a Motion to Dismiss and Memorandum in Support.
- On October 6, 1998, Defendant Elliot Jacobs filed a Motion To Strike one paragraph of the Amended Complaint regarding damages, and an alternative motion to add Moore & Van Allen as a necessary party, necessitating an Opposition.

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[6] Further evidence of this motion's frivolity is the Defendants' decision to file it before checking its authorities. See October 28, 1998 letter.

- On October 6, 1998, Defendants filed a Motion To Compel "Key Dispositive Documents," which led to numerous letters explaining that those documents had already been the subject of previous motions, and eventually required the preparation of an Opposition.
- On October 6, 1998, Defendants filed a motion with this Court to continue the trial, which required Plaintiff to prepare another lengthy Opposition, setting forth for this Court the history of this case.
- On October 6, 1998, Defendants filed a Motion For Leave of Court to Proceed with Discovery, including taking five discovery depositions (of witnesses who had previously been deposed) and an additional Rule 34 Request for Production of Documents, which necessitated an Opposition.
- On October 9, 1998, Defendants subpoenaed Mr. Sonnenschine (a manager of the Plaintiff), Mr. Taub (a manager of the Plaintiff), and Mr. Sabo (a previously unidentified witness) to "for trial" depositions in New York for October 21, 1998. This was in addition to the discovery motion seeking to depose Mr. Sonnenschine, and despite Plaintiff's counsel's assurances that Mr. Sonnenschine would appear for trial. Thus, Plaintiff was required to prepare a Motion to Quash those notices of deposition.
- On October 12, 1998, Defendants identified four Moore & Van Allen attorneys as witnesses for trial, in an effort to harass Plaintiff and its counsel, and necessitating a motion in limine.
- In their Motion To Continue Trial, as well as in correspondence with Plaintiff's counsel, Defendants have raised multiple baseless allegations of conflicts on the part of Plaintiff's counsel, to which counsel has spent a great deal of time preparing a response.

- On October 23, 1998, Defendants filed the instant Motion To Dismiss for Lack of Subject Matter Jurisdiction, raising an issue of *res judicata* (regarding the contempt issues alleged in the Amended Complaint) for approximately the fourth time in this action, requiring the Plaintiff to address this issue again, as well as to prepare this Opposition.
- On October 26, 1998, Defendants filed six Motions In Limine, five of which seek to reargue Defendants' summary judgment motions, all of which have been denied.
- On October 27, 1998, Defendants filed two additional (untimely) motions in limine, an untimely "Amended Trial Brief," and yet another (untimely) motion for summary judgment, requiring Plaintiff to respond and move to strike these new filings.

With the exception of (1) ordering two documents to be produced by Plaintiff and (2) ordering that Mr. Taub's "for trial" deposition be taken unless Mr. Taub could guarantee his appearance for trial, either the bankruptcy court or this Court has denied each of the above-referenced motions (save the pending motion to dismiss), and has quashed all of the subpoenas except for Mr. Taub's (the subpoena for Mr. Sabo was withdrawn, but not until Plaintiff had filed its Motion to Quash the Notice of Deposition). Counsel for Plaintiff has spent hundreds of hours in the three weeks prior to trial responding to these motions, all of which were filed with the intent to delay trial, to harass, and to distract Plaintiff's counsel from preparing for trial.

Local Rule 4.10, E.D.N.C., provides that the Court may assess costs against the party or counsel filing frivolous or delaying motions. In addition, a district court has inherent authority to sanction parties acting in bad faith, vexatiously, and wantonly. Chambers v. Nasco, Inc., 501 U.S. 32, 111 S.

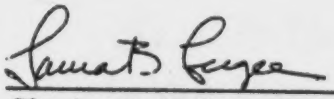
Ct. 2123, 115 L. Ed. 2d 27, reh'g denied, 501 U.S. 1269, 112 S. Ct. 12, 115 L. Ed. 2d 1097 (1991). The cumulative effect has been overwhelming. It appears that from the standpoint of the Defendants, who may ultimately be assessed attorneys' fees in this action, they have nothing to lose by continuing to file frivolous and delaying motions in an effort to have this case taken off the trial calendar for November 2. Thus, the Plaintiff requests the Court to sanction counsel and the Defendants for their egregious abuses.

CONCLUSION

WHEREFORE, the Plaintiff respectfully requests the Court to enter an Order (1) denying the Defendants' motion to dismiss; (2) sanctioning the Defendants and/or Defendants' counsel for the cumulative effect of their delaying motions, including a reasonable attorney's fee for opposing this frivolous motion; and (3) granting such other relief as the Court may deem necessary and just.

This 29th day of October, 1998.

Respectfully submitted,



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June 9, 2000

FILED

JUNE 12 2000

U.S. Court of Appeals
Fourth Circuit

VIA FEDERAL EXPRESS

Ms. Patricia S. Connor
Clerk, Fourth Circuit Court of Appeals
Lewis F. Powell, Jr. U.S. Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

RE: New Horizon of NY LLC v. Robert Jacobs, et al.
U.S.C.A. No. 99-1990 and 99-1996

Dear Ms. Connor:

On behalf of the Appellee, New Horizon of New York, LLC, and pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Local Rule 28(e), we draw the Court's attention to the following authorities on the issue of claims of contempt for damages as an independent basis for federal question jurisdiction and the importance of having a bankruptcy judge review and interpret its own orders: 18 U.S.C. § 401; In re General Motors Corp., 61 F.3d 256 (4th Cir. 1995); Folk v. Wallace Business Forms, Inc., 394 F.3d

240 (4th Cir. 1968); Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d 933 (4th Cir. 1997). United States v. Guariglia, 962 F.2d 160 (2nd Cir. 1992), discusses the district court's jurisdiction to hear claims related to the contempt of a bankruptcy court order. Finally, in Ridenhour, et al. v. Andrews Federal Credit Union, et al., this Circuit addressed a district court's pendent jurisdiction over state law claims. 897 F.2d 715, 722 (4th Cir. 1990). These supplemental authorities address issues raised by the panel during oral argument regarding federal subject matter jurisdiction.

Also pursuant to Local Rule 28(e), I am enclosing an additional three copies of this letter for filing, as well as an extra copy. Please return the extra copy, stamped "filed," to my attention in the enclosed self-addressed stamped envelope. I am also providing opposing counsel with copies of this letter.

Thank you in advance for your attention to this matter.

Very truly yours,

MOORE & VAN ALLEN, PLLC

Laura B. Luger

cc: Nathan Lewin, Esq.
James Exum, Esq.
Paul Sun, Esq.
Robert Jenkins, Esq.

18 U.S.C.A. § 401

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 21--CONTEMPTS

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 2948, c. 645, 62 Stat. 701.

Historical and Revision Notes

Reviser'sNote. Based on section 385 of Title 28, U.S.C., 1940, ed., Judicial Code and Judiciary (Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163 [Derived from R.S. § 725]).

Said § 385 conferred two powers. The first part authorizing courts of the United States to impose and administer oaths will remain in said Title 28. The second part relating to contempt of court constitutes this section.

Changes in phraseology and arrangement were made. 80th Congress House Report No. 304.

Cross References

Foreign witness, contempt by, see section 1784 of Title 28 Judiciary and Judicial Procedure.

Garnishee, failure to appear at term for which summoned, as contempt, see section 2405 of Title 28, Judiciary and Judicial Procedure.

Obstruction of justice, see section 1501 et seq. of this title.

Federal Rules of Criminal Procedure

Prosecution of criminal contempt by summary disposition or notice and hearing, see rule 42.

Statutory provisions defining criminal contempts, see Notes of Advisory Committee on Rules, rule 42.

61 F.3d 256

In re GENERAL MOTORS CORPORATION,
a Delaware Corporation, Petitioner.

No. 94-1011.
United States Court of Appeals,
Fourth Circuit.
Aug. 8, 1995.

Car manufacturer moved for order holding opposing counsel in civil contempt for violating prior court order prohibiting citation to lower court findings entered by the United States District Court for the District of South Carolina, G. Ross Anderson, Jr., J. The Court of Appeals held that counsel would be held in contempt and ordered counsel to pay for manufacturer's expenses related to correcting effects of the misconduct, as well as attorney fees and costs for the contempt proceeding.

So ordered.

1. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.

[See headnote text below]

1. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.4 1995.

Court of Appeals may impose sanctions for civil contempt to coerce obedience to court order or to

compensate complainant for losses sustained as result of the contumacy.

2. CONTEMPT k20
93 ----
93I Acts or Conduct Constituting Contempt of Court
93k19 Disobedience to Mandate, Order, or Judgment
93k20 In general.
C.A.4 1995.
Civil contempt is appropriate sanction if Court of Appeals can point to its own order that sets forth in specific detail unequivocal command that party has violated.

3. CONTEMPT k60(1)
93 ----
93II Power to Punish, and Proceedings Therefor
93k60 Evidence
93k60(1) Presumptions and burden of proof.
C.A.4 1995.
Burden is on the complainant to prove civil contempt by clear and convincing evidence.

4. CONTEMPT k20
93 ----
93I Acts or Conduct Constituting Contempt of Court
93k19 Disobedience to Mandate, Order, or Judgment
93k20 In general.
C.A.4 1995.
Counsel litigating many claims against car manufacturer would be found in civil contempt for violating specific and unequivocal commands of Court of Appeals' order, which struck inappropriate findings of lower court and

expressly ordered that specified portions of lower court's order were not to be cited as authority; counsel cited to the stricken findings in another court proceeding involving the manufacturer.

5. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.
C.A.4 1995.

Appropriate remedy for civil contempt is within court's broad discretion.

6. CONTEMPT k68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.

[See headnote text below]

6. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.
C.A.4 1995.

Remedies for civil contempt include ordering contemnor to reimburse complainant for losses sustained and for reasonable attorney's fees.

7. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.
C.A.4 1995.

Civil contempt remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive.

8. CONTEMPT k68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.

[See headnote text below]

8. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.4 1995.

As result of counsel's contumacious behavior in violating Court of Appeals' order that stated that lower court's inappropriate findings could not be cited as authority, car manufacturer against whom counsel was litigating was entitled to be compensated for its expenses germinating from the misconduct and to reasonable costs and attorney's fees for the contempt proceeding.

ORDER

On September 14, 1994, petitioner, General Motors Corporation (GM) commenced the instant proceedings by moving this court for an order requiring plaintiffs' counsel, Mr. James E. Butler, Jr. (Butler), to show cause why this court should not hold him in civil contempt, or impose other appropriate sanctions, for violating this court's order of March 23, 1994. On October 6, 1994, this court granted GM's motion and held a hearing on October 20, 1994, in order for Butler to show cause why he should not be held in

contempt. For reasons that follow, we hold Butler in civil contempt of this court's order of March 23, 1994.

I

On February 28, 1994, the Honorable G. Ross Anderson entered a fifty-nine page order recusing himself from further participation in Cameron v. General Motors Corp., Nos. 6:93-1278-3, 1279-3, 1280-3, 1994 WL 159408 (D.S.C. Feb. 28, 1994). In recusing himself, Judge Anderson held that a reasonable person could possibly question his "fairness and impartiality," and he accordingly vacated five outstanding discovery orders. Recusal Order at 59. In the order, Judge Anderson also made new findings of fact and conclusions of law on the specific issues addressed in the discovery orders that he found necessary to vacate.

Due to its belief that Judge Anderson's new findings and conclusions would potentially prejudice its case, GM moved this court on March 4, 1994, for an order striking certain portions of the recusal order. On March 23, 1994, we granted GM's motion. In that order, we reasoned that it was improper for Judge Anderson to make new findings of fact and conclusions of law on the issues addressed in the vacated orders. Our March 23, 1994, order, stated in pertinent part:

As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Subsequently, the Honorable Charles H. Haden II was appointed to preside over the Cameron litigation.

Following this court's March 23, 1994, order, Butler continued his representation of other clients pursuing products liability actions against GM in other courts, including a state court proceeding in Fulton County, Georgia, see Moseley v. General Motors Corp., No. 90-V-6276 (Sup.Ct., Fulton County, Ga.). During the course of the Moseley litigation, Butler submitted a nine-page letter dated August 30, 1994, to the Honorable Albert L. Thompson, the presiding judge in the Moseley case. On page three of the letter in a block quotation, Butler quoted directly from language in Judge Anderson's order that this court had ordered stricken in its order of March 23, 1994. In particular, he quoted the same language that this court had used in its order to exemplify the inappropriate findings included in Judge Anderson's order. In quoting the language, Butler also highlighted certain words that were not emphasized in Judge Anderson's original order. Butler specifically quoted the following passage:

A review of the thousands of documents in this case including in camera reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an attorney-client privilege is asserted are subject to the crime fraud exception [to the attorney-client privilege].

Letter of Aug. 30, 1994, at 3 (emphasis in letter) (quoting Recusal Order at 48). After quoting this passage, Butler cited Judge Anderson's recusal order. He also attached a complete copy of the order to the letter. (FN1)

In the paragraph following the quoted language, Butler noted that Judge Anderson had vacated several of his discovery orders in the recusal order and stated that Judge Haden in the Cameron case had "reinstated several of Judge Anderson's prior orders." Id. at 3. Additionally, in footnote eight on page eight of the letter, Butler again referenced Judge Anderson's findings, stating that "Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims." Id. at 8 n. 8. Nowhere in Butler's letter did he state that this court had stricken the portion of Judge Anderson's order he quoted and had ordered that the portion should not be cited as authority. Furthermore, nowhere in the letter did he mention that this court had stricken Judge Anderson's "findings" in relation to the liability of GM's counsel under Fed.R.Civ.P. 11.

Counsel for GM thereafter wrote Judge Thompson on September 2, 1994, and informed him that this court had stricken the language in the recusal order cited by Butler and had ordered that such findings in the order should not be cited as authority. The letter also advised Judge Thompson that Judge Haden had not reinstated the language stricken from Judge Anderson's recusal order. On September 20, 1994, Butler wrote to Judge Thompson apologizing for his "inexcusable and careless blunder" in including in his August 30 letter a "misleading and inaccurate" sentence, which implied that Judge Haden had adopted Judge Anderson's earlier findings that were quoted in his August 30 letter. Butler, however, did not state in the letter that this court had stricken the quoted passage from Judge Anderson's order and had ordered that the passage should not be cited as authority. Finally, on December 8, 1994, Butler sent a letter to Judge

Thompson, in which he expressly informed Judge Thompson that this court had stricken the portions he quoted in the August 30 letter. Butler explained that he had not notified Judge Thompson earlier because he believed Judge Thompson was "fully apprised" that the language had been stricken due to the fact that GM had informed him as such in its letter of September 2, 1994, and the fact that, in a status conference before Judge Thompson on September 8, 1994, neither party had raised the issue of the validity of Judge Anderson's findings. (FN2)

II

A

[1] [2] [3] We may impose sanctions for civil contempt "to coerce obedience to a court order or to compensate the complainant for losses sustained as a result of the contumacy." Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir.1988); see also United States v. United Mine Workers of America, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947). Civil contempt is an appropriate sanction if we can point to an order of this Court which "set[s] forth in specific detail an unequivocal command" which a party has violated. Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir.1986) (citation and internal quotation marks omitted); see also Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir.1991) ("[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous."). The burden is on the complainant to prove civil contempt by clear and convincing evidence. Id. Willfulness is not an element of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).

[4] We believe GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler

violated the specific and unequivocal commands of our order of March 23, 1994. In that order, we stated:

> As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Our order was clear and unequivocal. We struck Part III and other portions of Judge Anderson's recusal order as inappropriate, and expressly ordered that the specified portions of the order were not to "be cited as authority." Id. Despite this clear command, in his letter to Judge Thompson and brief filed on April 1, 1994, with the United States District Court in the District of Kansas in Cockrum v. General Motors Corp., No. 93-1180-MLB (D. Kan.), Butler cited and quoted directly from language in Judge Anderson's order that this Court had stricken. In our view, the evidence clearly and convincingly establishes that Butler violated our clear and unequivocal order of March 23, 1994.

B

[5] [6] [7] The issue is now one of remedy. The appropriate remedy for civil contempt is within the court's

broad discretion. McComb, 336 U.S. at 193-94, 69 S.Ct. at 500-501. Remedies include ordering the contemnor to reimburse the complainant for losses sustained and for reasonable attorney's fees. United States v. Trudell, 563 F.2d 889, 891 (8th Cir.1977). However, the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive. United Mine Workers, 330 U.S. at 302-04, 67 S.Ct. at 700-701. "Generally, a compensatory sanction 'may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding. " In re Tetracycline Cases, 927 F.2d 411, 413 (8th Cir.1991) (quoting NLRB v. Laborers' Int'l Union, 882 F.2d 949, 955 (5th Cir.1989)).

[8] It is clear to us that GM has suffered a compensable loss. There is no question that GM was injured as a direct result of Butler's citation to Judge Anderson's recusal order in his August 30, 1994, letter to Judge Thompson and his brief filed in Cockrum. GM has expended considerable resources to correct or thwart the effects of Butler's blatant misconduct in the Georgia state court and the United States District Court for the District of Kansas. Unquestionably, Butler's letter of August 30, 1994, caused GM to incur a considerable expense to defend actions in other jurisdictions that were premised on findings and conclusions this court had stricken and specifically ordered Butler not to cite. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses germinating from Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. Furthermore, GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court. (FN3)

III

In summary, we find Butler in contempt of our order of March 23, 1994. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. We also award GM reasonable costs and attorney's fees for the contempt proceeding before this court. From the date of this order, GM has twenty days to submit a summary of its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas and its costs and attorney's fees for this proceeding. Butler will have ten days to respond. (FN4) It is so ordered. (FN5)

FN1. Butler also discussed Judge Anderson's findings in a brief filed on April 1, 1994, with the United States District Court for the District of Kansas in Cockrum v. General Motors Corp., No. 93-1180-MLB (D. Kan.). In particular, Butler stated that "The Fourth Circuit [in its order of March 23, 1994] did not dispute or otherwise disagree with Judge Anderson's findings ... in his recusal order" and that Judge Anderson had found "a substantial likelihood that perhaps perjury and the systematic destruction of documents occurred." Plaintiffs' Brief in Opposition to Defendant General Motors Corporation's Motion for Protective Order at 14. In this brief, Butler never stated that Judge Anderson's findings were stricken and were not to be cited as authority; rather, Butler stated that this court in its order did not consider the evidence of perjury or destruction of documents but "simply ruled that such findings had no place within the confines of a recusal order." Id.

FN2. The parties in Cameron settled the case in December 1994. See Order of Dismissal, Cameron v. General Motors

Corp., Nos. 3:93-1278-07, 1279-07, 1280-07 (D.S.C. Dec. 30, 1994).

FN3. We find no merit to Butler's contention that this court lacks the authority to find him in civil contempt because the Cameron case has been settled. The nature of the contempt proceeding before the court is compensatory in nature, and unlike contempt proceedings that are coercive in nature, "the termination of the underlying action out of which the contempt hearing arose does not moot the contempt proceeding." Petroleos Mexicanos v. Crawford Enterprises, Inc., 826 F.2d 392, 400 (5th Cir.1987). This critical distinction between coercive civil contempt proceedings and compensatory civil contempt proceedings "rests upon the fact that the harm or injury that gives rise to the need for compensation continues unredressed at the end of the underlying litigation while the need for getting a party to act in the underlying litigation necessarily terminates when that litigation ends." Id. Without question, the harm suffered by GM--expending considerable resources in other jurisdictions to curb the effect of Butler's blatant misconduct--was unredressed at the time the Cameron case was settled, and, therefore, this contempt proceeding is not moot.

FN4. On June 22, 1995, eight months after Butler's show cause hearing, GM moved this court for "additional relief" relating to the contempt proceedings. In response to GM's motion, Butler filed a motion on June 30, 1995, requesting this court to dismiss the pending contempt proceedings. The court denies these motions.

FN5. If Butler has learned one thing from this proceeding, we hope it is this: the portions of Judge Anderson's recusal order which we struck in our order of March 23, 1994, are not to be cited as authority. We hope Butler will heed this admonition.

394 F.2d 240

Emerson D. FOLK and National Business Forms, Inc.,
Appellants,

v.

WALLACE BUSINESS FORMS, INC.,
Successor to Standard Business Forms, Inc.,
Appellee.

Emerson D. FOLK and National Business Forms, Inc.,
Appellees,

v.

WALLACE BUSINESS FORMS, INC.,
Successor to Standard Business Forms, Inc.,
Appellant.

Nos. 11994, 11995.
United States Court of Appeals Fourth Circuit.
Argued March 8, 1968.
Decided April 16, 1968.

Motion for contempt citation against former stockholder of plaintiff corporation and stockholder's corporation for violation of consent injunction which forbade former stockholder or his corporation from employing former employees of plaintiff corporation. The United States District Court for the Western District of North Carolina, at Charlotte, Wilson Warlick, Chief Judge, rendered judgment that the former stockholder and his corporation were in contempt and they appealed. The Court of Appeals, MacKenzie, District Judge, held that evidence that former stockholder and his new corporation made loans of money

and credit to employees of plaintiff corporation for purpose of organizing competitive corporation and that former stockholder subsequently acquired controlling interest in competitive corporation supported trial court's finding that former stockholder and his corporation violated consent injunction against employing, by direct or indirect means, employees of plaintiff corporation.

Affirmed.

1. INJUNCTION K 230(3)
212 ----
212VII Violation and Punishment
212k230 Proceedings
212k230(3) Evidence.

C.A.N.C. 1968.

Evidence that former stockholder and his new corporation made loans of money and credit to employees of plaintiff corporation for purpose of organizing competitive corporation and that former stockholder subsequently acquired controlling interest in competitive corporation supported trial court's finding that former stockholder and his corporation violated consent injunction against employing, by direct or indirect means, employees of plaintiff corporation.

2. CONTEMPT K 74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.N.C. 1968.

United States District Court has right to award civil contempt damages.

3. CONTEMPT K 68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.
C.A.N.C. 1968.
Attorneys fees may be awarded as element of award in civil contempt action.

4. CONTEMPT K 75
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k75 Amount of fine.
C.A.N.C. 1968.
Amount of civil contempt damages is within discretion of trial judge.

5. CONTEMPT K 68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.
[See headnote text below]

5. CONTEMPT K 75
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k75 Amount of fine.
C.A.N.C. 1968.
Trial judge did not abuse its discretion in civil contempt action by award of damages in the amount of $30,000 and attorneys' fees of $6,000.

William M. Pate, Atlanta, Ga. (Mitchell, Clarke, Pate & Anderson, Atlanta, Ga., Thomas Ashe Lockhart, and Cansler & Lockhart, Charlotte, N.C., on brief), for appellants in No. 11,994 and appellees in No. 11,995.

Fred B. Helms, Charlotte, N.C., and Henry M. Whitesides, Gastonia, N.C. (Helms, Mulliss, McMillan & Johnston, Charlotte, N.C., on brief), for appellee in No. 11,994 and appellant in No. 11,995.

Before BRYAN and CRAVEN, Circuit Judges, and MacKENZIE, District judge.

MacKENZIE, District Judge.

On October 21, 1957, Standard Business Forms, Inc. purchased Emerson D. Folk's interest in that corporation. As part of the consideration for the sale, the usual agreements were executed under which Mr. Folk agreed not to compete in a three state area and not to hire employees of Standard Business Forms, Inc. for a ten year period.

In 1959, a declaratory judgment suit was instituted by Folk and his new company, National Business Forms, Inc. to clarify the contract provisions relative to Folk's not hiring Standard's employees. On August 12, 1959, a consent permanent injunction was entered as follows:

> Now, therefore, it is ordered, adjudged and decreed as follows: 1. That the individual plaintiff, Emerson D. Folk, his heirs, executors, administrators, legal representatives, successors and assigns and the corporate plaintiff, National Business Forms, Inc., its officers, agents, servants, employees, attorneys, successors or assigns and all other persons in active concert or participation with them or either of them be and they are hereby permanently enjoined, inhibited and restrained from, directly or indirectly through any other person, firm or corporation or in any manner, until after December 31, 1967: Attempting to hire, hiring, employing or continuing to employ,

without the prior written approval of W. E. Hendricks, any person except Charles B. Brown, as set forth in the agreement of October 21, 1957, who was or has been at any time from October 21, 1954, to October 21, 1957, employed by Standard Business forms, Inc., a corporation with principal offices in Gastonia, North Carolina. 2. It is further ordered that the defendant and its surety be and they are hereby discharged from any bond heretofore posted in this proceeding, and that the plaintiffs be taxed with the costs hereof.

This 12th day of August, 1959.

(s) Wilson Warlick Wilson Warlick District Judge'.

Five years later, on October 14, 1964, Standard Business Forms, Inc., under its new merged title of Wallace Business Forms, Inc., moved for a contempt citation against Emerson D. Folk and his corporation, National Business Forms, Inc., for violating the permanent injunction set forth in the paragraph just above. In brief, the citation charged that Folk and National Business Forms, Inc., either collectively or separately, '* * * employed or caused to be employed in violation of said consent judgment and consent permanent injunction Clyde Walker, Witzel K. Chastain and J. B. Hodgins, all three of whom were employed by (Standard Business Forms, Inc.) at some time during the period between October 21, 1954 and October 21, 1957'.

After extensive hearings over a period of three years, on June 16, 1967, Chief Judge Wilson Warlick of the District Court for the Western District of North Carolina found that the injunction had indeed been violated and supplemented that finding by an order filed August 28, 1967, finding civil contempt damages against Folk and National Business

Forms, Inc., in favor of Wallace Business Forms, Inc. (formerly Standard Business Forms, Inc.) in the amount of $30,000.00 plus the costs arising from the prosecution of the contempt, and attorneys' fees of $6,000.00.

From the contempt order this appeal was taken by Folk and National Business Forms, Inc.

From that portion of the order fixing damages and attorneys' fees, a cross-appeal was taken by Wallace Business Forms, Inc. (formerly Standard Business Forms, Inc.).

The questions for decision on appeal are:

(1) Whether the finding of the trial court that Folk and National Violated the injunction by employing Witzel K. Chastain, Clyde Walker and J. B. Hodgins, is supported by the evidence;

(2) Whether the evidence supports the trial court's finding of injury to Standard or Wallace proximately resulting from the violation of the injunction found by the court;

(3) Whether the evidence authorizes a finding of damages in the amount of $30,000;

(4) Whether the award of attorneys' fees was proper.

We find ample evidence to support the findings of the District Court that Folk and National Business Forms, Inc. violated the injunction; that the damages as found by him proximately flowed from the violation and that the award of attorneys' fees was proper.

[1] It is admitted that Chastain, Walker and Hodgins were employees of Standard Business Forms, Inc. during the

period October 21, 1954 to October 21, 1957, and therefore covered by the permanent consent injunction of August 12, 1959, as being persons whose hiring was forbidden to Emerson D. Folk, National Business Forms, and all persons or corporations participating with Folk and National directly or indirectly.

Chastain, Walker and Hodgins left Standard and became employees of Eastern Business Forms, Inc., a corporation discussed by them as early as the fall of 1963, while they were still employed at Standard, and finally incorporated in September, 1964.

As early as February, 1964, while Chastain, Walker and Hodgins were still employed with Standard, Folk and National Business Forms were already aiding and abetting the three in creating Eastern Business Forms, Inc. It was then that Folk and National committed themselves for $35,000.00 for a press for Chastain, Walker and Hodgins, and this at a time when the personal credit of the three Standard employees could not possibly have warranted it. Incidentally, Chastain, a $12,000.00 a year employee of Standard, could make a $3,500.00 down payment in cash to Folk for the press equipment because Chastain 'had this money left over from some bonds he had sold in the fall of 1963 to take care of his daughter's wedding and had been carrying around in cash ever since.' Note that the down payment was made to Folk who ordered the press, in National's name, from the manufacturer.

Six months later, in August, 1964, one month before the Eastern Business Forms, Inc. began business, and two or three weeks after Chastain had left Standard, Folk loaned Chastain $40,000.00, without any security, on a note written in pencil on a piece of scrap paper. According to Chastain, he did not tell Folk what the money was for, nor did Folk ask him. Folk could not remember whether he knew of Chastain's new business venture or not. Chastain, at the time, was out of work and his $9,000.00 home had a

$10,000.00 mortgage to Folk already on it. At this point, Folk and National were underwriting Chastain, Walker, Hodgins and Eastern for $89,000.00 consisting of guaranteeing the payment of a press ($35,000.00), a rubber plate machine ($4,000.00), an unrecorded mortgage on Chastain's home ($10,000.00), and an unsecured loan to Chastain ($40,000.00).

At the time of the hiring by Eastern of Chastain, Walker and Hodgins, Folk had provided $50,000.00 (through 'loans' to Chastain) of the total subscribed capital of Eastern of $85,000.00. In addition, through his corporate credit guarantee, he had made possible the press, the one major item, and the rubber plate machine, the second of the absolute requirements for Eastern to begin operations.

The trial court was justified in finding such financing indicated a greater interest by Folk and National in Chastain, Walker, Hodgins and Eastern Business Forms, Inc. than just kindnesses extended to an old friend. Indeed, so Folk considered it, when, according to the record, he said:

> 'Q. Well, you seemed to know who had the controlling interest.
>
> A. Sure, I found out after this trial began. I would have been foolish not to learn the whole set up. At no time could the money I had in there get controlling interest of that stock'.

It is not necessary to discuss these 'loans' from Folk in any great detail as there is ample evidence to support the District Court's finding of multiple subterfuge. Suffice it to say, Folk's $10,000.00 mortgage on Chastain's $9,000.00 home was most informal. As Folk stated it, '* * * I made a little memorandum out and he and his wife signed it, but it wasn't-- I don't even know whether it was-- I suppose it was legal, but I didn't take the trouble to put it in legal terms and

take it to the courthouse and record it, because I had trust in him'.

The $40,000.00 'loan' from Folk to Chastain in August of 1964 was even less formal. It consisted of a pencil written note; Chastain did not remember whether he informed Folk what it was to be used for; and no collateral was offered. This $40,000.00 'loan' drifted in this fashion until there suddenly appeared a most comprehensive and technical security agreement drawn by Folk's attorney, executed October 24, 1964, posting Chastain's Eastern Business Forms, Inc. stock as security. It seems more than just coincidental that this security agreement was quickly produced in the short interim between the notice of October 13, 1964, to question Chastain, Walker and Hodgins and the schedule for those depositions on October 28, 1964.

Through these 'loans' and other devices, Folk and National did, in fact, provide Eastern as the employment vehicle which hired Standard employees Chastain, Walker and Hodgins. Through this camouflage they violated the injunction by acting in concert with others. The injunction specifically forbade any such 'indirect' action.

Folk and National attorneys focus their entire attack on the term 'employee' and its meaning as related to Chastain, Walker and Hodgins. In view of our finding that Folk and National violated the injunction through their indirect manipulations with Eastern Business Forms, Inc., it is not necessary to worry with this 'employee' semantics.

[2] [3] No one seriously questions the right of the Court to award civil contempt damages which have long been recognized. Parker v. United States, 153 F.2d 66, 163 A.L.R. 379 (1st Cir. 1946); Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1910); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). So also as to the right to include attorneys' fees as an element of the award

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1922); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967).

[4] [5] The question of the amount of civil contempt damages of $30,000.00 and attorneys' fees of $6,000.00 was clearly within the discretion of the Trial Judge who heard all of the testimony and we are not persuaded that his finding was erroneous.

Accordingly, the finding of the District Court is affirmed.

Affirmed.

105 F.3d 933
37 Collier Bankr.Cas.2d 654, Bankr. L. Rep. P 77,293

In re Shirley Mae TOMLIN,
Debtor.
COLONIAL AUTO CENTER,
Plaintiff-Appellee,

v.

Shirley Mae TOMLIN,
Defendant-Appellant.

No. 95-2509.
United States Court of Appeals,
Fourth Circuit.
Argued Dec. 4, 1996
Decided Feb. 3, 1997.

Creditor moved for determination of dischargeability of debts in existence at time debtor's prior Chapter 7 case was dismissed "with prejudice." The United States Bankruptcy Court for the Western District of Virginia, William E. Anderson, J., denied creditor's motion for summary judgment, and appeal was taken. The District Court, James H. Michael, Jr., Senior District Judge, 184 B.R. 720, vacated and remanded. On further appeal, the Court of Appeals, Diana Gribbon Motz, Circuit Judge, held that bankruptcy court's interpretation of "with prejudice" language of its order dismissing debtor's prior Chapter 7 case, as not forever barring debtor from obtaining discharge of debts existing at time dismissal order was entered, but as serving merely to impose moratorium on debtor's ability to refile for bankruptcy relief, was not unreasonable and would be accepted on appeal.

Order of District Court reversed; case remanded.

1. BANKRUPTCY K 3782
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 Conclusions of law; de novo review.
C.A.4 (Va.) 1997.

Ambiguous or unambiguous nature of "with prejudice" language of bankruptcy court order dismissing debtor's prior Chapter 7 case was question of law, which Court of Appeals considered de novo on appeal in subsequent bankruptcy case.

2. BANKRUPTCY K 2235
51 ----
51III The Case
51III(B) Debtors
51k2235 Simultaneous or successive proceedings.

[See headnote text below]

2. BANKRUPTCY K 2264(3)
51 ----
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.
C.A.4 (Va.) 1997.

"With prejudice" language of bankruptcy court order dismissing debtor's prior Chapter 7 case did not clearly and unambiguously preclude debtor from discharging debts in existence at time dismissal order was entered, but could also be interpreted merely as imposing moratorium on debtor's ability to refile for bankruptcy relief, where dismissal order was not unqualified dismissal order but required dismissal

only for reasons set forth in trustee's motion, and where grounds alleged by trustee in support of dismissal order, including debtor's failure to attend hearing, would not support severe sanction of precluding future discharge of then-existing debts. Bankr.Code, 11 U.S.C.A. § 349(a).

3. JUDGMENT K 570(1)

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k570 Judgment on Discontinuance, Dismissal, or Nonsuit

228k570(1) In general.

C.A.4 (Va.) 1997.

Generally, dismissal of action with prejudice is complete adjudication of issues presented by pleadings and is bar to any further action between parties.

4. JUDGMENT K 542

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k541 Courts or Other Tribunals Rendering Judgment

228k542 In general.

C.A.4 (Va.) 1997.

Principles of res judicata apply to decisions of bankruptcy court.

5. BANKRUPTCY K 2235

51 ----

51III The Case

51III(B) Debtors

51k2235 Simultaneous or successive proceedings.

[See headnote text below]

5. BANKRUPTCY K 2264(3)
51 ----
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.

C.A.4 (Va.) 1997.

While bankruptcy court, in dismissing case, has authority to forever bar any discharge of debts existing at time of dismissal order, bankruptcy courts rarely use their authority to bar discharge of debts in later cases. Bankr.Code, 11 U.S.C.A. § 349(a).

6. FEDERAL CIVIL PROCEDURE K 2820
170A ----
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2820 Non-monetary sanctions.

C.A.4 (Va.) 1997.

In any court, dismissal order that bars subsequent litigation is severe sanction warranted only by egregious misconduct.

7. BANKRUPTCY K 2235
51 ----
51III The Case
51III(B) Debtors
51k2235 Simultaneous or successive proceedings.
[See headnote text below]

7. BANKRUPTCY K 2264(3)
51 ----
51III The Case

51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.

[See headnote text below]

7. BANKRUPTCY K 3341
51 ----
51X Discharge
51X(C) Debts and Liabilities Discharged
51X(C)1 In General
51k3341 In general.
C.A.4 (Va.) 1997.

Generally, it is only if debtor engages in egregious behavior that both demonstrates debtor's bad faith and prejudices creditors that bankruptcy court will forever bar debtor from seeking to discharge his or her then existing debts. Bankr.Code, 11 U.S.C.A. § 349(a).

8. BANKRUPTCY K 3779
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 Scope of review in general.
C.A.4 (Va.) 1997.

When bankruptcy court order is ambiguous, appellate court must construe its meaning, and in so doing, may resort to record upon which order was based.

9. BANKRUPTCY K 3779
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 Scope of review in general.
C.A.4 (Va.) 1997.

Court of Appeals would give substantial deference to bankruptcy court's analysis of its own order dismissing prior Chapter 7 case, for purposes of deciding whether "with prejudice" language in prior dismissal order precluded debtor from obtaining discharge of any debts existing at that time, as bankruptcy court was best qualified to determine why it had dismissed proceeding. Bankr.Code, 11 U.S.C.A. § 349(a).

10. BANKRUPTCY K 3789.1
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3789 Determination and Disposition; Additional Findings
51k3789.1 In general.
C.A.4 (Va.) 1997.

Bankruptcy court's interpretation of "with prejudice" language of its order dismissing debtor's prior Chapter 7 case, as not forever barring debtor from obtaining discharge of debts existing at time dismissal order was entered, but as serving merely to impose moratorium on debtor's ability to refile for bankruptcy relief, was not unreasonable and would be accepted on appeal in subsequent bankruptcy case, for purposes of deciding whether debtor was barred by res judicata from obtaining discharge of debts existing at time her earlier bankruptcy case was dismissed; bankruptcy court's interpretation of its order was in keeping with grounds set forth by trustee in moving for dismissal, which did not include any egregious misconduct by debtor of kind

which might warrant perpetual denial of discharge, but consisted of debtor's failure to attend creditors' meeting and failure to file schedules. Bankr.Code, 11 U.S.C.A. §§ 109(g), 349(a).

ARGUED: Mark Bennett Peterson, Ogle & Peterson, Charlottesville, VA, for Defendant-Appellant. Steven Shareff, Palmyra, Virginia, for Plaintiff-Appellee. ON BRIEF: Gail S. Ogle, Ogle & Peterson, Charlottesville, VA, for Defendant-Appellant.

Before ERVIN, WILKINS, and MOTZ, Circuit Judges.

Reversed and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge ERVIN and Judge WILKINS joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In this case a creditor asserts that an order dismissing "with prejudice" a bankrupt debtor's Chapter 7 petition precluded the debtor from subsequently seeking to discharge debts existing at the time of that order. Although a bankruptcy court certainly has the power to bar a debtor from further litigating the dischargeability of pending debts, the order at issue here is ambiguous. For this reason, we defer to the bankruptcy court's interpretation of its own order as one limiting subsequent filings, not forever prohibiting the right to seek a discharge of existing debt, and reverse the district court's contrary holding.

I.

On December 27, 1991, Shirley Mae Tomlin and her husband signed a retail installment contract with Colonial Auto Center, Inc. ("Colonial") to purchase a pickup truck. Eight months later, Colonial repossessed the truck, then sold it at public auction. The sale left a deficiency of $5,284.63. On May 28, 1993, Colonial obtained a state court judgment against Tomlin for the amount of the deficiency plus interest and court costs. Subsequently, Colonial obtained another judgment against Tomlin for $1,500.00 plus interest, arising from her failure to pay a deposit owing to Colonial. The balance remaining on these two judgments constitute the debt at issue in this case.

This is the sixth bankruptcy petition Tomlin has filed in the past seven years. On May 25, 1990, Tomlin and her husband filed a petition pursuant to Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301-1330 (1994). On August 20, 1990, the bankruptcy court confirmed the Tomlins' Chapter 13 plan (an amended plan was confirmed on November 14, 1990). On January 17, 1991, Union Planters National Bank ("Union Planters") moved for relief from the stay imposed pursuant to Chapter 13. On May 3, 1991, the bankruptcy court ordered the stay lifted. On July 15, 1991, the bankruptcy court granted the Tomlins' voluntary motion to dismiss.

On July 25, 1991, Tomlin individually filed a second Chapter 13 petition. She did not submit a confirmable plan and on September 12, 1991, Union Planters moved for relief from the stay. On December 6, 1991, the bankruptcy court granted Tomlin's motion to dismiss the petition.

On April 24, 1992, Tomlin, again with her husband, filed still another Chapter 13 petition. During the pendency of this petition, the Tomlins neither attended creditors' meetings nor timely filed bankruptcy schedules. On June 22, 1992, the bankruptcy court heard the trustee's motion to

dismiss and ordered the Tomlins to cure all defaults by June 26, 1992. The Tomlins failed to abide by that order. On July 6, 1992, the bankruptcy court ordered the petition dismissed.

On September 18, 1992, Tomlin filed a pro se Chapter 7 petition to stop the foreclosure sale of her residence. *11 U.S.C. §§ 701-728* (1994). During the pendency of this petition, Tomlin did not pay the filing fee, did not attend the creditors' meeting, and did not file schedules. On November 13, 1992, the bankruptcy court dismissed the petition.

On December 17, 1992, Tomlin filed another pro se Chapter 7 petition again to stop the foreclosure sale of her residence. The next day, after Union Planters filed an emergency motion for relief from the stay, the bankruptcy court lifted the stay in an order in which it noted that it appeared that Tomlin had filed the petition in violation of *11 U.S.C. § 109(g)* (1994). A month later, on January 21, 1993, the trustee filed a motion to dismiss Tomlin's petition "with prejudice" because she had caused unreasonable delay that was prejudicial to her creditors by failing to: appear at an initial creditors' meeting, timely file her schedules, or prosecute the bankruptcy case she had filed two months before. Tomlin did not respond in any way to the trustee's motion. After a hearing, which Tomlin did not attend, on February 11, 1993, the bankruptcy court issued a dismissal order, stating only that "[f]or the reasons set forth" in the trustee's motion, Tomlin's petition would be dismissed "with prejudice."

Twenty months later, on October 14, 1994, Tomlin filed another Chapter 7 petition; this time she was represented by counsel. On November 15, 1994, the bankruptcy court entered an order discharging Tomlin's debts.

Prior to that discharge order, Colonial filed the instant action to determine the dischargeability of debts pending as of the February 11, 1993 order dismissing "with

prejudice" Tomlin's December 17, 1992 Chapter 7 petition. Colonial moved for summary judgment, asserting that the February 11 order barred Tomlin from subsequently seeking to discharge debts existing at that time.

After a hearing, the bankruptcy court issued an order and a memorandum opinion denying Colonial's motion for summary judgment. The bankruptcy court reasoned:

> The [February 11, 1993] dismissal order, although ambiguously designated simply "with prejudice," was intended only to invoke the sanction set forth in the first paragraph of § 109(g)--that the debtor be barred from filing another petition for 180 days. The matters addressed in the trustee's motion do not warrant imposition of the far more serious sanction of making all pending debts nondischargeable. The trustee did not request such a severe sanction in either the motion or at the hearing. And because the debtor did not appear at the hearing, the order dismissing the case was in effect by default.
>
> (footnotes omitted).

Colonial appealed to the district court, which reversed. Colonial Auto Center, Inc. v. Tomlin, 184 B.R. 720 (W.D.Va.1995). The district court recognized that, if there were "any ambiguity or obscurity" in an order, reference could properly be made to the "findings and entire record for determining what was decided." *Id. at 727* (quoting *Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062, 1066 (10th Cir.1980)*). However, the district court found no "ambiguity or obscurity" in the bankruptcy court's order and so held the order had the "res judicata effect

of precluding the discharge of debts in subsequent bankruptcy petitions." Id. Tomlin appeals.

II.

[1]The first question presented here is a deceptively simple one: is the bankruptcy court's February 11, 1993 order ambiguous. Our review of this legal question is de novo.

[2]Colonial asserts that "dismissed with prejudice" can have "only one reasonable interpretation," namely, the final dismissal of all claims that were, or could have been, brought in the action. Brief for Appellee at 8. Thus, Colonial claims that the February 11, 1993 order "dismissing Tomlin's prior Chapter 7 case 'with prejudice' had the res judicata effect of precluding the subsequent discharge of her debts existing at the filing of the dismissed case." Id. at 6.

[3] [4]As Colonial points out, generally "dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." *Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530, 534 (4th Cir.1991)* (quoting *Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir.1985)*). Moreover, principles of res judicata certainly apply to decisions of bankruptcy courts. See Katchen v. Landy, 382 U.S. 323, 334, 86 S.Ct. 467, 475, 15 L.Ed.2d 391 (1966). Indeed, although the Bankruptcy Code establishes a general rule that dismissal of a case is without prejudice, it also expressly grants a bankruptcy court the authority to "bar the discharge, in a later case ... of debts that were dischargeable in the case dismissed...." *11 U.S.C. § 349(a)* (1994); 3 Collier on Bankruptcy § 349.02[2] (15th ed. rev. 1994).

[5] [6]However, a bankruptcy court rarely uses its authority to bar the discharge of debts in a later case. See *In re Robinson, 198 B.R. 1017, 1023 n. 7 (Bankr.N.D.Ga.1996).*

In any court, a dismissal order that bars subsequent litigation is a severe sanction warranted only by egregious misconduct. See *Durham v. Florida E. Coast Ry. Co., 385 F.2d 366, 368 (5th Cir.1967)* (citing *Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)*). Given that the Bankruptcy Code's "central purpose" is remedial, i.e., to afford insolvent debtors an opportunity to "enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,' " *Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991)* (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)), such an order is particularly devastating in a bankruptcy case. For this reason, a permanent bar to discharge is at times referred to as the "capital punishment of bankruptcy," for it "removes much of the benefit" of the bankruptcy system. *In re Merrill, 192 B.R. 245, 253 (Bankr.D.Colo.1995).*

[7]This "drastic sanction which may affect substantial rights of the litigant" is usually limited to "extreme situations." *In re Martin-Trigona, 35 B.R. 596, 601 (Bankr.S.D.N.Y.1983)* (citing *Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir.1968)*). Generally, only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors--for example, concealing information from the court, violating injunctions, or filing unauthorized petitions--will a bankruptcy court forever bar the debtor from seeking to discharge then existing debts. See, e.g., In re Moses, 171 B.R. 789, 793-94 (Bankr.E.D.Mich.1994); Martin-Trigona, 35 B.R. at 601-02; In re Jerry's Blue Room, 19 B.R. 963, 964 (Bankr.E.D.Pa.1982).

Far more frequently, if a bankruptcy court disciplines a debtor, it will do so with a different sanction, one that is less drastic, but which is nonetheless often referred to as a dismissal with prejudice. This is a

dismissal triggering *11 U.S.C. § 109(g) (1994)*, which temporarily bans the debtor from filing further petitions. (FN1) Section 109(g) provides:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

This statute was added to the Bankruptcy Code in 1984 to address the precise abuse of the bankruptcy system at issue here--the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code's automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest. See, e.g., 1 William L. Norton, Jr., Norton Bankruptcy Law and Practice § 18:14 at 18-55-56 (2nd ed. 1994); Jeffrey W. Morris, "Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984," *27 Wm. & Mary L.Rev. 91, 101 (1985)*; *In re Faulkner, 187 B.R. 1019, 1022 (Bankr.S.D.Ga.1995)*.

Thus, the Bankruptcy Code provides a bankruptcy court with authority both to bar subsequent discharge of existing debt and to bar successive petitions under § 109(g). Although the two sanctions differ dramatically in purpose and effect, bankruptcy courts often refer to both sanctions as dismissals "with prejudice."

Even prior to the addition of § 109(g) to the Bankruptcy Code in 1984, bankruptcy courts would order a debtor to cease filing successive petitions and refer to such an order as a "dismissal with prejudice." See, e.g., *In re Damien, 35 B.R. 685, 687 (Bankr.S.D.Fla.1983)* (concluding that "every court that has considered the question has concluded that the Bankruptcy Court has discretion to dismiss with prejudice to refiling") (citing In re Sando, 30 B.R. 474, 476-77 (E.D.Pa.1983)); In re Petro, 18 B.R. 566, 567 (Bankr.E.D.Pa.1982) (finding debtors in contempt for filing an action within a year of the issuance of an order dismissing "with prejudice" their previous action).

The language of the 1984 amendments to the Bankruptcy Code apparently has increased the prevalence of this practice. In addition to the adoption of § 109(g), codifying the court's power to temporarily bar refiling, the 1984 amendments also revised the language of § 349, adding the emphasized language:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.
>
> 11 U.S.C. § 349(a) (emphasis added).

Indeed, this new language has prompted some speculation that Congress intended to eliminate a bankruptcy court's power to bar permanently the discharge of existing debt. See, e.g., Dennis Montali, "Important Bankruptcy Code Changes in the Bankruptcy Amendments and Federal Judgeship Act of 1984," 332 PLI/Comm 61, 68 (1984) (New § 349(a) states that disqualification under § 109[g] constitutes a dismissal of the case with prejudice. Unfortunately, the amendment to § 349(a) can be read to exclude from the "dismissal with prejudice" label any other dismissal of a bankruptcy case since it now reads: " ' * * * nor does the dismissal of a case * * * prejudice the debtor with regard to the filing of a subsequent petition, except as provided in section 109[g] * * *.' "); Michael T. Andrew, "Real Property Transactions and the 1984 Bankruptcy Code Amendments," 20 Real Prop. Prob. & Tr. J. 47, 72 n. 107 ("It might be thought that the [language of § 349(a)] limits the prejudicial impact of a dismissal to that provided in new § 109[g]....").

Our analysis of the plain language and "statutory scheme" of the statute, Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.), 27 F.3d 980, 982-83 (4th Cir.1994) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)), leads us to conclude that § 349 was never intended to limit the bankruptcy court's ability to impose a permanent bar to discharge that would have res judicata effect. Rather, the language of § 349, as amended, "seems to make clear that the court has the power to order" such a sanction "in circumstances other than those dealt with by new § 109[g]." Andrew at 72 n. 107.

But what is equally clear is that it has become common bankruptcy practice to employ the phrase "dismissed with prejudice" to refer to a temporary bar to filing another petition. As the court observed in In re Robinson, 198 B.R. 1017 (Bankr.N.D.Ga.1996):

> The usual remedy for a bad faith filing is a dismissal pursuant to § 109(g), which works to prohibit the filing by a debtor of any case under Title 11 for a period of 180 days. 11 U.S.C. § 109(g). Such a dismissal is frequently and imprecisely referred to (only by bankruptcy practitioners) as a "dismissal with prejudice."

Id. at 1022 (emphasis added); see also 2 Norton § 33:19 at 33-23 ("Although under Code § 349(a), a case may be dismissed without prejudice, where the court finds cause, the case may be dismissed with prejudice to refiling further petitions.").

Representative of the many cases in which a § 109(g) bar to refiling has been characterized as a dismissal "with prejudice" are several cases from courts in this circuit. See, e.g., Jolly v. Great W. Bank (In re Jolly), 143 B.R. 383, 385 (E.D.Va.1992) ("Debtors argue that the bankruptcy court misapplied [Code provisions] in dismissing Debtors' case with prejudice for 180 days."), aff'd, 45 F.3d 426 (4th Cir.1994); In re Hollis, 150 B.R. 145, 147 (D.Md.1993) ("According to 11 U.S.C. § 349, dismissal of a bankruptcy petition is without prejudice, except as provided in section 109(g).") (footnote omitted); Owings v. Doniff (In re Doniff), 133 B.R. 351, 354 (Bankr.E.D.Va.1991) (ordering "dismissal with prejudice pursuant to 11 U.S.C. § 349" and enjoining the debtor "from filing a bankruptcy petition for a period of 180 days after dismissal").

There are also numerous similar cases from other jurisdictions. See, e.g., In re Jones, 192 B.R. 289, 291 (Bankr.M.D.Ga.1996) ("It is clear that the drafters of the Bankruptcy Code and Bankruptcy Regulations knew how to provide for a dismissal with prejudice. See 11 U.S.C.A. §§ 109(g) and...."); In re Armwood, 175 B.R. 779, 787

(Bankr.N.D.Ga.1994) ("The usual remedy for a bad faith filing is dismissal 'with prejudice,' which works to prohibit the filing by a debtor of any case under Title 11 for a period of 180 days."); In re Gros, 173 B.R. 774, 777 (Bankr.M.D.Fla.1994) (As "the debtor's multiple bankruptcy filings, coupled with involuntary dismissals [was] cause to dismiss this case with prejudice," the court barred the debtor from filing another petition for two years without court permission.); In re Standfield, 152 B.R. 528, 539-40 (Bankr.N.D.Ill.1993) ("The totality of the circumstances warrants the imposition of dismissal of this case with prejudice ... and the prohibition of the filing of another case for a period of 180 days...."); In re Jourdan, 108 B.R. 1020, 1021-22 (Bankr.N.D.Iowa 1989) (noting that "there is nothing to prevent a debtor from immediately refiling another Chapter 13 case ... so long as the previous dismissal was without prejudice...."); Lerch v. Federal Land Bank of St. Louis (In re Lerch), 94 B.R. 998, 1001 (N.D.Ill.1989) ("The clear meaning of [§ 349] is that unless the court 'for cause, orders otherwise,' the court may not dismiss a case with prejudice for a period beyond the explicit 180-day limitation found in Section 109(g)."). (FN2)

Thus, notwithstanding Colonial's assertions, in the bankruptcy context a "dismissal with prejudice" does not have "only one reasonable interpretation." Rather, the term "dismissal with prejudice" in bankruptcy cases can either permanently bar discharge of certain debts or it can trigger the bar to filing successive petitions under § 109(g).

Of course, the actual language of a given order may eliminate any ambiguity. The bankruptcy court's February 11, 1993 order provided that, "for the reasons set forth" in the trustee's motion to dismiss, the case was "dismissed with prejudice."

The order contains no specific reference to the § 109(g) bar to filing successive petitions. Cf. In re Dandy

Doughboy Donuts, Inc., 66 B.R. 457, 458 (Bankr.S.D.Fla.1986). Nor does it state the period of time that it would be in effect, e.g., the 180-day period provided in § 109(g) or a longer period. Cf. Gros, 173 B.R. at 776; In re McKissie, 103 B.R. 189 (Bankr.N.D.Ill.1989); In re Conley, 105 B.R. 116, 117 (S.D.Fla.1989). Thus the order does not contain two of the more usual provisions indicating intent to invoke the bar to successive filings under § 109(g).

However, sometimes bankruptcy courts do not include such indicia in dismissal orders but simply dismiss "with prejudice," when they nonetheless intend to bar refiling. See e.g., In re Peia, 145 B.R. 749, 750 (Bankr.D.Conn.1992); In re Hollis, 150 B.R. 145, 146 (D.Md.1993); In re Petro, 18 B.R. 566, 569 (Bankr.E.D.Pa.1982). Colonial argues that such unqualified "with prejudice" dismissals do not provide precedent for concluding that the order at issue here was ambiguous. Brief for Appellee at 17-18. It emphasizes that the opinions accompanying the orders in Peia and Hollis indicated that all that was intended in those cases was a bar on refiling while in this case there is no similar clarification in an accompanying opinion or, indeed, any accompanying opinion at all. Id.

Although we agree that these cases do not provide a direct precedent for Tomlin's position, we nonetheless find them relevant. In distinguishing them, Colonial implicitly concedes that language in an accompanying opinion can change the meaning of what Colonial asserts would otherwise be an unambiguous order barring a debtor from subsequently seeking to discharge existing debts. This concession illustrates the slipperiness of a "with prejudice" dismissal in the bankruptcy context.

Nevertheless, Colonial asserts that the dismissal "with prejudice" order in this case was totally "unqualified" and thus unambiguous. Brief for Appellee at 9. Contrary to

Colonial's assertions, the order at issue here is not a totally "unqualified" dismissal "with prejudice." Rather, the order provides that the case is dismissed "with prejudice" "for the reasons set forth" in the trustee's motion.

The trustee moved to dismiss Tomlin's Chapter 7 petition "with prejudice" only after the bankruptcy court had lifted the automatic stay in an order that specifically noted that Tomlin had apparently filed her petition "in violation of § 109(g)." Moreover, the trustee listed the following grounds in support of its motion to dismiss: (1) Tomlin's failure to appear at the initial creditors' meeting; (2) her failure to file her schedules on time, and (3) her failure to prosecute her September 18 bankruptcy case. These reasons hardly constitute examples of the egregious conduct and bad faith, which has generally been regarded as the necessary predicate to barring a debtor from forever seeking to discharge debts existing at the time of the dismissal order. Cf. Martin-Trigona, 35 B.R. at 601-02; Moses, 171 B.R. at 793-94. Rather, the usual remedy, even for far more prevalent serial filing than that presented to the bankruptcy court in this case (in moving to dismiss, the trustee only mentioned one of Tomlin's earlier filings) is the § 109(g) temporary bar to filing. See, e.g., In re Penz, 121 B.R. at 602, 604-05 (Bankr.E.D.Okla.1990); Gros, 173 B.R. at 777; Peia, 145 B.R. at 750.

Although when moving to dismiss "with prejudice" the trustee did not specifically invoke § 109(g), the bankruptcy court itself had invoked § 109(g) against Tomlin just two months before when lifting the automatic stay. Moreover, in moving to dismiss "with prejudice" the trustee asserted classic § 109(g) reasons for seeking the dismissal. Accordingly, we believe the bankruptcy court's order granting the trustee's motion to dismiss "with prejudice," for the reasons set forth" in that motion, is ambiguous. This, of course, does not mean that the order necessarily imposed a §

109(g) sanction. It may have triggered this bar or it may, as Colonial claims, have banned Tomlin from subsequently seeking the discharge of existing debt.

III.

[8] Our remaining task is to determine the meaning of the ambiguous order at issue here. When an order is ambiguous, a court "must construe its meaning, and in so doing may resort to the record upon which the judgment was based." Spearman v. J & S Farms, Inc., 755 F.Supp. 137, 140 (D.S.C.1990). See also Sec. Mut. Cas. Co., 621 F.2d at 1066 ("If there is any ambiguity or obscurity" in an order, "reference may be had to the findings and the entire record for the purpose of determining what was decided.").

The record here includes the 1995 memorandum opinion of the bankruptcy court interpreting its 1993 dismissal "with prejudice" to mean a bar to refiling under § 109(g). We have previously observed that we will defer to a district court's interpretation of its own order. See Anderson v. Stephens, 875 F.2d 76, 80 n. 8 (4th Cir.1989); Simmons v. South Carolina State Ports Auth., 694 F.2d 63, 66 (4th Cir.1982). We must now decide whether similar deference should be accorded to a bankruptcy court's interpretation of its order.

Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir.1995), is instructive. There, the bankruptcy court had entered a court order confirming a reorganization plan, and subsequently interpreted it to protect the former lawyers of an insurance company. On appeal, the insurance company argued that the order did not afford their former lawyers this protection. The First Circuit rejected the insurance company's challenge, explaining:

> Even though our interpretation of the confirmation order essentially presents a question of law, the bankruptcy court in this case was interpreting its own order of confirmation. We think customary appellate deference is appropriate in these circumstances with respect to the bankruptcy court's determination that the confirmation order was sufficiently broad to confer "incidental" protection to [the lawyers].

Id. at 983 (emphasis added) (internal citation omitted).

[9] We believe that the bankruptcy court's interpretation of its own order here similarly warrants "customary appellate deference." The bankruptcy court was "in the best position to interpret its own orders." Texas N.W. Ry. Co. v. Atchison, Topeka and Santa Fe Ry. Co. (In re Chicago, Rock Island & Pac. R.R. Co.), 860 F.2d 267, 272 (7th Cir.1988). Accord Hastert v. Illinois St. Bd. of Elect. Comm'rs., 28 F.3d 1430, 1438 (7th Cir.1993). The First Circuit noted in Monarch that the bankruptcy court "was directly engaged" in the earlier proceedings and thus had the "better vantage point" to make a determination on its earlier order. Monarch, 65 F.3d at 983. Similarly, the bankruptcy court here was "directly engaged" in Tomlin's earlier case, giving it a "better vantage point" from which to assess the order's meaning. Since "[t]he court best qualified to determine why it is dismissing a proceeding is the court doing the dismissing," we will give substantial deference to the bankruptcy court's analysis on its own order to dismiss. In re Bono, 70 B.R. 339, 343 (Bankr.E.D.N.Y.1987). See also Ranch House of Orange-Brevard, Inc. v. Gluckstern (In re Ranch House of Orange-Brevard, Inc.), 773 F.2d 1166, 1168 (11th Cir.1985) (expressing reluctance to overturn a court's interpretation of its own order because "[t]he

Bankruptcy judge who has presided over a case from its inception is in the best position to clarify any apparent inconsistencies in the court's rulings.").

[10] Examination of the record demonstrates that the bankruptcy court's interpretation of its order is reasonable in light of the facts of this case. The bankruptcy court noted that the trustee's motion did "not warrant imposition of the far more serious sanction of making all pending debts nondischargeable. The trustee did not request such a severe sanction in either the motion or at the hearing." Instead, the trustee cited Tomlin's failure to attend the initial creditors' meeting and failure to file her schedules. The trustee's motion stated that Tomlin had caused unreasonable delay and had prejudiced her creditors by this behavior. No doubt Tomlin's behavior constitutes an abuse of the protection afforded her by the bankruptcy system. Her purpose seemed clear; by continuously filing petitions, the automatic stay prevented foreclosure action on her home. This is the very behavior for which Congress formulated § 109(g). 1 Norton § 18:14 at 18-58-59. The bankruptcy court's order--as interpreted by that court--was the most appropriate sanction for the abuse Tomlin committed. By prohibiting her from filing another petition immediately after the dismissal of the case, the court prevented Tomlin from committing the very behavior that triggered the sanctions in the first place. (FN3)

Nor does the fact that the order at issue here contains no finding of willfulness undermine the bankruptcy court's conclusion it was intended to trigger a § 109(g) sanction. Colonial is quite correct that "the plain language" of § 109(g) bars a subsequent filing sanction only if the bankruptcy court finds a previous case was dismissed because of a debtor's "willful failure" to abide by a court order. Brief for Appellee at 15. But that finding need not be made at the time of the earlier dismissal; it can be made when the bankruptcy court is later called upon to determine if § 109(g) bars a subsequent filing. See Montgomery v. Ryan (In re

Montgomery), 37 F.3d 413, 415 (8th Cir.1994); Robinson, 198 B.R. at 1023 n. 8; In re Faulkner, 187 B.R. 1019, 1023 (Bankr.S.D.Ga.1995); In re Pappalardo, 109 B.R. 622, 626 (Bankr.S.D.N.Y.1990). For example, in Montgomery, 37 F.3d at 414-15, the bankruptcy court's order stated only that the case was dismissed because the debtor failed to attend a creditors' meeting; there was no finding of willfulness. Within 180 days, the debtor sought to file another petition. Id. at 414. At that time, the bankruptcy court found that the prior dismissal was based on the debtor's willful failure to follow a court order and so § 109(g) barred the subsequent filing. Id. at 415. The Eighth Circuit affirmed explaining, "a finding of willfulness was necessary only when the bankruptcy court dismissed the second petition." Id. See also Faulkner, 187 B.R. at 1023 ("Since the language of section 109(g) is set out as an eligibility requirement, the determination cannot be made until the filing of the successive case.").

In the case at hand, the trustee's motion clearly indicated that Tomlin's behavior demonstrated a willful failure to prosecute her case. That the bankruptcy court made no finding of willfulness in the 1993 order is therefore not determinative. If Tomlin had filed a subsequent action within 180 days of the previously dismissed action, the court could have made that finding at that time based on a review of Tomlin's record in the earlier proceedings.

Finally, Colonial heavily relies on In re Smith, 133 B.R. 467 (Bankr.N.D.Ind.1991), as compelling the conclusion that the order at issue here must be one prohibiting Tomlin from seeking the discharge of existing debt. That reliance is misplaced. Although Smith resolves differently the same issue we have grappled with here, it is no way inconsistent with our decision. In Smith when the debtors and trustees in a Chapter 7 case failed to come to an agreement, the trustee moved the bankruptcy court to dismiss the case or to deny discharge. Judge Riegle of the

bankruptcy court granted the motion, and issued an order stating "that this case be dismissed with prejudice." Id. at 468. Eighteen months later, the debtors filed another Chapter 7 petition and the trustee again moved to dismiss, asserting the earlier dismissal "with prejudice" precluded the debtors "from ever seeking further relief" under the Bankruptcy Code. Id. A different bankruptcy judge, Judge Grant, properly rejected that argument and then interpreted Judge Riegle's order to mean a permanent bar on discharging the debts in question at the time of the previous filing: "The dismissal of a bankruptcy case with prejudice 'denies a debtor [the] future discharge of debts dischargeable in that particular case.' " Id. at 470 (quoting Frieouf v. United States (In re Frieouf), 938 F.2d 1099, 1103 (10th Cir.1991)).

Smith provides no authority for Colonial's position here because the order in Smith, unlike that here, apparently was an unadorned dismissal "with prejudice." Moreover, the Smith order was issued in response to the trustee's request to "dismiss the case or ... deny the discharge." 133 B.R. at 467. In contrast, the trustee in the instant case never requested that Tomlin be denied the right to seek to discharge her debts in the future, but instead asked that her case be dismissed on typical § 109(g) grounds. Thus, the Smith order differs from that presented here in that it apparently was an unqualified and unambiguous order preventing the debtor from subsequently seeking to discharge existing debt.

Even if the Smith order were identical to that at issue here (and there is no indication it was), our holding would still not be inconsistent with that of Smith. Our conclusion that the order before us is ambiguous does not signify that it was definitively a § 109(g) order. We deferred to the interpretation of the court that fashioned the order to resolve this ambiguity. In Smith, the court that fashioned the order never opined as to its meaning. If it had done so, a court subsequently examining the order might well have deferred to the original court's interpretation, as we have done here.

IV.

For these reasons, we reverse the order of the district court, which had reversed the bankruptcy court, and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FN1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 352, 269 (1984), added new subsection (f) to § 109 to provide a 180-day bar to filing. This was redesignated as subsection (g) by § 253 of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub.L. 99-554, 100 Stat. 3105 (1986). Throughout this opinion, it will be referred to as § 109(g).

FN2. Of course, as the district court recognized, a bankruptcy court can impose sanctions under § 109(g) without dismissing a case "with prejudice." See Colonial Auto Center, 184 B.R. at 726. What is significant is that bankruptcy courts so frequently do characterize a dismissal intended to trigger § 109(g) as a dismissal "with prejudice." Indeed, some courts have been reluctant to impose § 109(g) sanctions if the underlying order was without prejudice. See In re Felts, 60 B.R. 736 (Bankr.W.D.Ky.1986) ("It is the opinion of the court that the present petition is not violative of 11 U.S.C. Section 109[g] since the [prior] dismissal ... expressly denoted that said dismissal was 'without prejudice.'"); 1 Norton § 18:14 at 18-57.

FN3. Of course, similar conduct has also been found to merit the imposition of a permanent bar to discharge the debts existing at the time of the dismissal. Some courts seem to have equated the "willful failure" to obey a court order necessary to trigger a § 109(g) sanction with the "bad faith" leading to a permanent bar to the discharge of the debts. See, e.g., In re McClure, 69 B.R. 282, 284-85

(Bankr.N.D.Ind.1987). However, the majority of bankruptcy courts have sought clear evidence of "bad faith" before proceeding to prohibit a debtor from ever discharging then existing debts, evidence that goes beyond mere willfulness. Jerry's Blue Room, 19 B.R. at 964 (bad faith actions merit "serious" and "rarely invoked" remedy of dismissal with prejudice); Moses, 171 B.R. at 798 (same); Martin-Trigona, 35 B.R. at 601 (same). Cf. Hall v. Vance, 887 F.2d 1041, 1045 (10th Cir.1989) (filing monthly reports and plan late does not constitute evidence of bad faith, and thus, no dismissal with prejudice can be imposed).

UNITED STATES of America,
Appellee,

v.

Anthony GUARIGLIA,
Defendant-Appellant.

No. 409, Docket 91-1372.
United States Court of Appeals,
Second Circuit.
Argued Jan. 7, 1992.
Decided April 17, 1992.

Defendant was convicted in the United States District Court for the Southern District of New York, Michael B. Mukasey, J., of criminal contempt for violating bankruptcy court order and of perjury, and he appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) District Court could in the first instance punish for criminal contempt violation of order of bankruptcy court; (2) in evaluating materiality of perjury committed at trial before petit jury, focus is properly on impact of perjury on trier of fact, not on whether investigation would or could have resulted without the perjury, and standard for testing for materiality is whether false testimony was capable of influencing fact finder in deciding issues before it; and (3) appellate court's reversal of convictions on basis that if jury had been aware of witness' perjury, jury probably would have acquitted defendants, established materiality of witness' false statements for purposes of prosecuting witness for perjury.

Affirmed.

1. BANKRUPTCY K 2134
51 ----
51II Courts; Proceedings in General
51II(A) In General
51k2134 Contempt.
C.A.2 (N.Y.) 1992.

District court could in the first instance punish for criminal contempt violation of order of bankruptcy court; bankruptcy court order restraining officer of corporate debtor from gambling was issued by bankruptcy court as "unit" of district court, and statute providing court with power to punish for disobedience of "its" order accordingly provided district court with jurisdiction to hear and determine contempt case arising from violation of bankruptcy court order. 18 U.S.C.A. § 401(3); 28 U.S.C.A. § 151.

See publication Words and Phrases for other judicial constructions and definitions.

2. PERJURY K 36
297 ----
297II Prosecution
297k35 Trial
297k36 Questions for jury.
C.A.2 (N.Y.) 1992.

Determination of materiality of defendant's allegedly perjurious statement is for trial court to determine as matter of law, rather than for jury determination. 18 U.S.C.A. § 1623.

3. PERJURY K11(2)
297 ----
297I Offenses and Responsibility Therefor
297k11 Materiality of Testimony or Assertion
297k11(2) Materiality in general.
C.A.2 (N.Y.) 1992.

In evaluating materiality of perjury committed at trial before petit jury, focus is properly on impact of perjury on trier of fact, not on whether investigation would or could have resulted without the perjury, and standard for testing for materiality is whether false testimony was capable of influencing fact finder in deciding issues before it, requiring analysis in terms of perjury's impact on ultimate verdict. 18 U.S.C.A. § 1623.

4. PERJURY K 11(2)
297 ----
297I Offenses and Responsibility Therefor
297k11 Materiality of Testimony or Assertion
297k11(2) Materiality in general.
C.A.2 (N.Y.) 1992.

Appellate court's reversal of convictions on basis that if jury had been aware of witness' perjury, jury probably would have acquitted defendants, established materiality of witness' false statements for purposes of prosecuting witness for perjury; conclusion in the prior criminal case established that false testimony was at least capable of influencing jury on issue of guilt or innocence. 18 U.S.C.A. § 1623.

Michael D. Rips, New York City (Allison Manning, Cathy W. Isaacson, David F. Bayne, Wright Manning Rips & Maloney; Lawrence G. Sager; and Howard F. Cerny, of counsel), for defendant-appellant.

Steven A. Standiford, Asst. U.S. Atty., New York City (Otto G. Obermaier, U.S. Atty. and Daniel C. Richman, Asst. U.S. Atty., of counsel), for appellee.

Before MINER, ALTIMARI and MAHONEY, Circuit Judges.

MINER, Circuit Judge:

Defendant-appellant Anthony Guariglia appeals from a judgment of conviction entered on June 3, 1991 in the United States District Court for the Southern District of New York (Mukasey, J.) after a jury found him guilty of criminal contempt, under 18 U.S.C. § 401(3), for violating a bankruptcy court order, and of perjury, under 18 U.S.C. § 1623. The charges against defendant stem from his participation in a bribery and fraud conspiracy involving the officers and directors of the Wedtech Corporation ("Wedtech"), and his subsequent cooperation with the government in the prosecution of other participants in the scheme. United States v. Wallach, 935 F.2d 445 (2d Cir.1991).

The indictment alleged that (i) defendant by his gambling activities violated a bankruptcy court order restraining defendant and other Wedtech defendants from, among other things, "gambling with any property or monies owned, controlled, or possessed by any of [them];" and (ii) defendant made perjurious statements at the trial of other Wedtech defendants by testifying that he had not gambled after the summer of 1988, when he in fact gambled in the fall of that same year. Defendant appeals his conviction, arguing, inter alia, that the district court did not have authority, under section 401, to sanction defendant for violation of the bankruptcy court order, and that the district court committed reversible error by applying the wrong legal standard for the "materiality" element of perjury. For the reasons stated below, we affirm the judgment of the district court.

BACKGROUND

This appeal is part of the tangled litigation web surrounding the now defunct Wedtech and the dubious dealings that defendant and others had with and through the corporation. The checkered history of Wedtech--a South Bronx based engineering company subsisting largely on government contracts--and the scandals leading to its demise are more fully set forth in this Court's opinion in Wallach, 935 F.2d 445.

Defendant Guariglia joined Wedtech in May 1983, and was the corporation's President and Chief Operating Officer, as well as a member of its Board of Directors. Guariglia and other Wedtech officers and directors allegedly engaged in a conspiracy to bribe government officials, commit mail fraud, and make illegal payments to labor officials. On December 26, 1986, Wedtech filed for bankruptcy. In early 1987, Wedtech filed an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York against Guariglia and three other former Wedtech officers to recover corporate money and assets that allegedly were converted to improper personal uses.

On January 26, 1987, Guariglia entered into a cooperation agreement with the government whereby he pled guilty to conspiracy to bribe government officials, conspiracy to file false statements, and conspiracy to commit mail fraud. On March 11, 1987, Wedtech obtained a preliminary injunction from the bankruptcy court restraining Guariglia from disposing of any of his assets. Pursuant to his cooperation agreement with the government, Guariglia testified as a government witness, in the spring of 1988, at the trial of Congressman Mario Biaggi, Bronx Borough President Stanley Simon, and other individuals participating in Wedtech misdealings. From this testimony, Wedtech

learned that while Guariglia was cooperating with the government, he had lost substantial sums of money as a consequence of gambling in Atlantic City, New Jersey.

On June 30, 1988, Wedtech obtained an order on stipulation from the bankruptcy court directing entry of final partial judgment against Guariglia, in the amount of $1,624,702, for sums Guariglia improperly diverted and received from Wedtech. On that same date, the bankruptcy court filed a second stipulation and order ("Order"), which provided:

> Defendants ... are restrained from transferring, converting, disposing of or gambling with any property or monies owned, controlled or possessed by any of the defendants without prior approval of either the [bankruptcy court] or Wedtech....

In the spring and summer of 1989, Guariglia extensively testified for the government as a key witness at the trial of Rusty K. London, E. Robert Wallach, and Wayne F. Chinn, who were alleged participants in the Wedtech criminal scheme. See Wallach, 935 F.2d at 455. On direct examination, Guariglia stated that he had ceased gambling after the summer of 1988. Id. On cross-examination, however, Guariglia admitted that he had signed gambling markers in September and October of 1988. Id. On redirect, Guariglia attempted to explain that although he had signed the markers, he did not gamble with the chips, claiming that he used the chips to satisfy a previously incurred debt. Id. In December 1989, four months after conviction of the Wallach defendants, the government learned from Ira Cohen, a former friend and business associate of Guariglia's, that Cohen had seen Guariglia gambling in Puerto Rico in November 1988.

Thereafter, Guariglia admitted to federal prosecutors that he had gone to Puerto Rico and signed markers at a casino, but he denied having gambled with the chips.

On June 26, 1990, Guariglia was indicted in the district court for criminal contempt of the bankruptcy court Order prohibiting him from gambling (see 18 U.S.C. § 401(3)), perjury committed at the Wallach trial (see 18 U.S.C. § 1623), and making false statements to federal prosecutors (see 18 U.S.C. § 1001). At his trial, the district judge concluded that the materiality element of perjury was for the court to decide, and determined, citing United States v. Berardi, 629 F.2d 723, 729 (2d Cir.), cert. denied, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980), that " '[m]ateriality is ... demonstrated if the question posed is such that a truthful answer could help the inquiry, or a false response hinder it, and these effects are weighed in terms of potentiality rather than probability.' " The court then found that the element was met, since "a truthful answer ... could have tended to undermine Guariglia's credibility, and thus could have helped the inquiry on which the jury was embarked...." A jury convicted Guariglia on the contempt and perjury charges, but not on the charge of making false statements to prosecutors. The jury apparently rejected Guariglia's claim that he did not gamble with the chips that he had purchased. For the reasons set forth below, we affirm the judgment of conviction entered in the district court.

DISCUSSION

I. The district court's exercise of jurisdiction

[1] The federal contempt statute, 18 U.S.C. § 401, provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Guariglia argues that, under this statute, the district court did not have the authority to sanction him for violation of the Order of the bankruptcy court. He asserts that the plain language of section 401(3)--providing the court with the power to punish for disobedience of "its" order--requires that the court sanctioning the defendant be the same court which issued the order that is the basis for the contempt. Guariglia contends that Bankruptcy Rule 9020 prescribes the contempt procedure to be followed for contempt of the bankruptcy court Order, and that this Rule requires that the issue first be submitted to the bankruptcy court for a hearing and determination, with the opportunity for de novo review in the district court. We do not agree.

Section 151, Title 28 of the United States Code, entitled "Designation of bankruptcy courts," states:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.

28 U.S.C. § 151 (emphasis added). Under this provision, "much of the autonomy has been stripped from the bankruptcy courts, now labeled 'units' of the district courts." Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1514 (5th Cir.1990). Indeed, "[t]he district court may withdraw, in whole or in part, any case or proceeding [from the bankruptcy court] ... for cause shown." 28 U.S.C. § 157(d); see also Goerg v. Parungao, 930 F.2d 1563, 1565 (11th Cir.1991) ("original jurisdiction over bankruptcy cases is vested in Article III courts and [the] bankruptcy courts [retain] jurisdiction only at the discretion of the district court") (citing 28 U.S.C. §§ 1334(a) and (b), 151, 157).

By definition, under the statutory scheme, the bankruptcy court Order restraining Guariglia from gambling was issued by a "unit" of the district court. See 28 U.S.C. § 151. As an Order originating from a unit of the district court, it necessarily follows that the Order constitutes an Order of both the bankruptcy court and the district court for the district encompassing the bankruptcy court from which the Order emanated. Thus, the district court clearly had the authority to punish for disregard of "its" authority. See 18 U.S.C. § 401(3); cf. Resyn Corp. v. United States, 945 F.2d 1279, 1284 (3d Cir.1991) (holding that since bankruptcy court is unit of district court, statute entitling successful litigant to interest on money judgment "recovered in district court" necessarily applies to bankruptcy court judgments); United States v. Klein, 910 F.2d 1533 (7th Cir.1990) (reinstating jury verdict obtained in district court finding defendant guilty of criminal contempt, under 18 U.S.C. § 401(3), for violation of bankruptcy court order). Therefore, under the plain language of section 401, the district court had

jurisdiction to hear and determine the contempt case against Guariglia for violation of the bankruptcy Order.

We note also that there is a serious question as to whether the bankruptcy court would have had the authority to punish Guariglia for criminal contempt of its Order had the government first sought a determination by the bankruptcy court. See Bankr.R. 9020, Advisory Comm. Note-1987 Amendment ("This rule, as amended, recognizes that bankruptcy judges may not have the power to punish for contempt."); see also Griffith, 895 F.2d at 1509 (bankruptcy court lacks power to punish for criminal contempt). We need not resolve this issue, however, as we now hold that a district court may, in the first instance, punish for criminal contempt a violation of an order of a bankruptcy court where the bankruptcy court is a "unit" of the district court imposing the punishment.

II. "Materiality" standard for perjury

[2] To be convicted of perjury, a defendant must have made a "false material declaration" "to any court or grand jury of the United States." 18 U.S.C. § 1623. It is firmly established that the trial court initially determines the materiality of a defendant's statement as a matter of law, United States v. Mancuso, 485 F.2d 275, 280 (2d Cir.1973) (citations omitted), before submitting the remaining factual issues to the jury. See Kungys v. United States, 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988); Sinclair v. United States, 279 U.S. 263, 298-99, 49 S.Ct. 268, 273-74, 73 L.Ed. 692 (1929); cf. United States v. Novod, 927 F.2d 726, 729 (2d Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991); United States v. Demauro, 581 F.2d 50, 53 (2d Cir.1978). In light of the overwhelming weight of established authority, we decline Guariglia's invitation to hold that the materiality issue must be submitted for jury determination.

In this case, the district judge concluded that the statements in issue were material because "a truthful answer ... could have tended to undermine Guariglia's credibility, and thus could have helped the inquiry on which the jury was embarked...." (emphasis added). Guariglia asserts that the district court applied the incorrect standard for materiality. He relies on our decision in United States v. Freedman, 445 F.2d 1220 (2d Cir.1971), claiming that "in order for a knowingly false statement to be material, it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further investigation would have occurred." Id. at 1226-27 (emphasis added).

[3] Generally, we have deemed a statement material, for purposes of evaluating perjury before a grand jury, when a "truthful answer could conceivably have aided the grand jury investigation." Mancuso, 485 F.2d at 280-81 (emphasis added). See also United States v. Moon, 718 F.2d 1210, 1237 (2d Cir.1983); United States v. Berardi, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980). This formulation derives from Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763, 47 S.Ct. 477, 71 L.Ed. 880 (1927), where we stated that testimony is material if it "has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation...." Id. at 953. In Freedman, we relied on our Carroll analysis, but phrased the standard in terms of "would have," where the false testimony was given during an SEC investigative proceeding. Our subsequent perjury cases arising in the investigatory context have not clearly delineated when the "would have," rather than "could have," test should be applied. In point of fact, those cases cast serious doubt on whether the two tests function differently as a practical matter, as we have noted that the same conclusion results in each of those cases under either formulation. See Novod, 927 F.2d at 729 n. 1; Demauro, 581 F.2d at 53 n. 1;

United States v. Doulin, 538 F.2d 466, 470 n. 3 (2d Cir.), cert. denied, 429 U.S. 895, 97 S.Ct. 256, 50 L.Ed.2d 178 (1976); Mancuso, 485 F.2d at 281 n. 17.

We need not, however, resolve the issue of the standard of materiality to be applied for false statements made in an investigative setting because this case involves perjury committed at a trial before a petit jury. In evaluating materiality in this context, the focus properly is on the impact on the trier of fact, not on whether further investigation would or could have resulted. Therefore, our prior precedents setting forth the standards to be applied in various investigative settings are of limited usefulness.

With regard to perjury committed at trial before a petit jury or a judge sitting as a factfinder, we previously have concluded that "[t]he test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it]." United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). See also United States v. Salinas, 923 F.2d 339, 341 (5th Cir.1991); United States v. Flowers, 813 F.2d 1320, 1325-26 (4th Cir.1987); United States v. Sablosky, 810 F.2d 167, 169 (8th Cir.), cert. denied, 484 U.S. 833, 108 S.Ct. 109, 98 L.Ed.2d 68 (1987); United States v. Anderson, 798 F.2d 919, 926 (7th Cir.1986); United States v. Girdner, 773 F.2d 257, 259 (10th Cir.1985), cert. denied, 475 U.S. 1066, 106 S.Ct. 1379, 89 L.Ed.2d 605 (1986); United States v. Scivola, 766 F.2d 37, 44 (1st Cir.1985). In the trial context, this standard properly reflects the notion that the materiality of false trial testimony should be analyzed in terms of the false testimony's impact on the factfinder's ultimate verdict, and not in terms of whether the false testimony hinders further inquiry.

[4] Applying this standard, we already have determined that Guariglia's false statements were capable of influencing the Wallach tribunal on the issues before it, and therefore are material for purposes of the perjury statute. In

Wallach, we reversed the defendants' convictions because we found that "had the jury been aware of Guariglia's perjury[,] it probably would have acquitted the defendants." Wallach, 935 F.2d at 458 (emphasis added). This finding obviously satisfies the materiality standard, since such a determination necessarily means that the statements were capable of influencing the jury on the issue of guilt or innocence of the defendants in that case.

Guariglia argues that different tests are applied in deciding whether a statement is material for perjury purposes and in deciding whether perjured testimony warrants reversal of a conviction. He asserts that the Wallach holding, being a product of the latter analysis, should not be determinative when analyzing materiality in his perjury trial and does not foreclose this Court from deeming the statements not material. We reject this strained reasoning. Regardless of the legal question at issue in Wallach, our conclusion in that case makes it plain that the false testimony was at a minimum capable of influencing the jury on the issue of guilt or innocence. Therefore, based on Wallach's conclusion as to the impact of Guariglia's false testimony on that trial's outcome, we find the false trial testimony to be material.

We have considered appellant's remaining arguments and find them to be without merit.

CONCLUSION

For the reasons stated, we affirm the judgment of the district court.

52 Empl. Prac. Dec. P 39,705

Paul W. RIDENOUR; Oliver H. Perry, II;
Paula A. Geitner; Judith L. Hopper,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION; Frank J. Colson,
Chairman, Board of Directors; Lasalle Petty, Jr., Col. Vice
Chairman, Board of Directors; Leo M. Neff, Secretary and
Member Board of Directors; Woodrow W. Jenkins,
Treasurer and Member Board of Directors;
William J. Baldridge; Ronald J. Fitzgerald; Frederick
Szwed, Members, Board of Directors; Ronald G. Nahas;
Jack Arzoomanian, Chairman, Supervisory Committee;
William F. Brooks,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Oliver H. PERRY, II; Paul W. Ridenour;
Paula A. Geitner; Judith L. Hopper,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION; Frank J. Colson,
Mr., Chairman, Board of Directors; Lasalle Petty, Jr., Col.
Vice Chairman, Board of Directors; Leo M. Neff, Secretary
and Member Board of Directors; Woodrow W. Jenkins,
Treasurer and Member Board of Directors;
William J. Baldridge; Peter J. Orlik, Jr.; Ronald J.
Fitzgerald; Ronn M. Hamrah, Lt. Col.; Frederick Szwed,
Members, Board of Directors; Ronald G. Nahas, President;
Jack Arzoomanian, Chairman,
Supervisory Committee; William F. Brooks,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Judith L. HOPPER; Paul W. Ridenour;
Oliver H. Perry, II; Paula A. Geitner,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION;
Frank J. Colson; Lasalle Petty, Jr., Col. Vice Chairman,
Board of Directors; Leo M. Neff, Secretary and Member
Board of Directors; Woodrow W. Jenkins, Treasurer and
Member Board of Directors; William J. Baldridge;
Peter J. Orlik, Jr.; Ronald J. Fitzgerald;
Ronn M. Hamrah, Lt. Col.; Frederick Szwed,
Members, Board of Directors; Ronald G. Nahas,
President; Jack Arzoomanian, Supervisory Committee,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Nos. 88-2173, 88-2197 and 88-2198.
United States Court of Appeals,
Fourth Circuit.
Argued July 10, 1989.
Decided March 2, 1990.
Rehearing and Rehearing In Banc Denied Marcy 27, 1990.

Former employees of credit union brought action against credit union and individuals arising out of alleged adverse employment actions taken against them. The United States District Court for the District of Maryland, John R. Hargrove, J., dismissed claims and plaintiffs appealed. The Court of Appeals, Phillips, Circuit Judge, held that: (1) no implied right of action existed under Federal Credit Union Act; (2) no federal common-law cause of action accrued to

plaintiffs' benefit; and (3) because federal claims, as pleaded, were sufficiently substantial to invoke federal jurisdiction to inquire into their merits, district court improperly dismissed state law claims for lack of independent basis of jurisdiction.

Affirmed in part; vacated and remanded in part.

1. FEDERAL CIVIL PROCEDURE k1741
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1741 In general.

C.A.4 (Md.) 1990.

Mere claim in complaint that right exists under federal law suffices to avoid summary dismissal unless it is facially insubstantial or frivolous, and even nonfrivolous claim that remedy may be implied from federal statute will suffice.

2. FEDERAL CIVIL PROCEDURE k1742(1)
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1742 Want of Jurisdiction
170Ak1742(1) In general.

Formerly 170Ak1742

C.A.4 (Md.) 1990.

If it is determined that federal court's jurisdiction fails because no federal claim exists, proper disposition is to dismiss on merits for failure to state claim rather than for want of subject matter jurisdiction.

3. FEDERAL COURTS k243

170B ----

170BIII Federal Question Jurisdiction

170BIII(D) Pleading

170Bk242 Sufficiency of Allegations

170Bk243 Particular cases.

C.A.4 (Md.) 1990.

Former credit union employees' federal claims under Federal Credit Union Act were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits. Federal Credit Union Act, Sec. 1 et seq., as amended, 12 U.S.C.A. Sec. 1751 et seq.

4. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

No express right of action existed under Federal Credit Union Act in favor of former credit union employees who claimed that improper adverse employment actions were taken against them. Federal Credit Union Act, Secs. 1 et seq., 110, 111, 113, as amended, 12 U.S.C.A. Secs. 1751 et seq., 1760, 1761, 1761b.

5. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

No implied right of action existed under Federal Credit Union Act in favor of former credit union employees who claimed that improper adverse employment actions were taken against them. Federal Credit Union Act, Sec. 1 et seq., as amended, 12 U.S.C.A. Sec. 1751 et seq.

6. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

There was no federal common-law cause of action accruing to benefit of former credit union employees who claimed that improper adverse employment actions were taken against them.

7. FEDERAL COURTS k18

170B ----

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk18 Validity or substantiality of federal claims and disposition thereof.

C.A.4 (Md.) 1990.

Where federal claims were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits, trial court's dismissal of state law claims for lack of independent basis of jurisdiction was improper; facially sufficient federal claims supplied adequate basis for trial court to exercise its discretion in determining whether to retain pendent jurisdiction over state law claims even though federal claims were dismissed on merits.

William J. Kenney (William J. Kenney & Associates, P.C., Washington, D.C., on brief), for plaintiffs-appellants.

Francis Joseph Nealon (Marianne P. Eby, Amy S. Owen, Miles & Stockbridge, Washington, D.C., Paul W. Grimm, Robert Smith, Jordan, Coyne, Savits & Lopata, Baltimore, Md., on brief), for defendants-appellees.

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

PHILLIPS, Circuit Judge:

Paul Ridenour, Oliver Perry, Paula Geidner, and Judith Hopper appeal the district court's order dismissing for lack of subject matter jurisdiction their claims against Andrews Federal Credit Union and several individual defendants relating to alleged adverse employment actions taken against them by the defendants. The appellants sought recovery on the ground that the credit union and some of its officers violated rights secured to them, in their capacity as shareholders-members of the defendant credit union, by the Federal Credit Union Act, 12 U.S.C. Secs. 1751 et seq. (FCUA). In addition, they alleged violations of Title VII, 42 U.S.C. Sec. 2000e, and breaches of state law tort and contract duties. The district court held that it lacked jurisdiction because the claims relating to the FCUA did not "arise under" federal law, the Title VII claims had not satisfied jurisdictional prerequisites, and no independent jurisdictional basis existed over the pendent state claims. We affirm dismissal of the federal claims, though on somewhat different grounds as to the claims under the FCUA. We remand the state claims for the court to determine whether to exercise pendent jurisdiction over them.

I

Until 1987, appellants Geidner, Hopper, and Perry were supervisory employees of the local Andrews Federal Credit Union, and appellant Ridenour served as Secretary-Treasurer of the credit union and on its board of directors. In their complaints in the district court, the appellants alleged that Ronald Nahas, the President of the credit union and one of the numerous individual defendants, had some time before

1986 adopted a pattern and practice of overt sexual harassment of credit union employees. Responding to complaints from employees under their supervision during 1986 and 1987, Geidner, Perry, and Hopper reported Nahas' allegedly offensive practices to Ridenour in his capacity as an officer and director of the credit union. After investigation and inquiry, Ridenour compiled a report concerning Nahas' conduct and, pursuant to federal regulations, submitted the report to the supervisory committee of Andrews Federal Credit Union.

In November 1987, the board of directors removed Ridenour from his position on the credit union's board of directors. Ridenour had been elected to a new three-year term in March 1987, but had not been renominated as Secretary-Treasurer. His removal from the Board instigated the various claims in this action. Ridenour himself alleged that his removal violated his rights as a credit union member under 12 U.S.C. Secs. 1760, 1761, and 1761b. Those sections of the Federal Credit Union Act, 12 U.S.C. Secs. 1751 et seq., he claimed, entitled him to remedies for violations of his rights to democratic governance of his credit union. Ridenour also asserted claims under Title VII, 42 U.S.C. Sec. 2000e and various state law causes of action. In a claim under the FCUA similar to Ridenour's, Geidner, Hopper, and Perry alleged "wrongful interference with [the] credit union's democratic governance" supposedly in violation of 12 U.S.C. Sec. 1760. They sought relief for the frustration of their credit union voting rights caused by the removal of Ridenour, for whom they had voted in the March 1987 board of directors election. In addition to some state law claims, Geidner, Hopper, and Perry also sued under Title VII, alleging that during 1987 they were either discharged or constructively discharged from their jobs at the credit union in retaliation for their role in pursuing the complaints against Nahas.

The district court dismissed the entire action for lack of subject matter jurisdiction. The court held that the claims invoking the FCUA did not "arise under" federal law because resolution of a federal question would play no significant role in the proceedings. It also held that none of the Title VII claims could support federal jurisdiction, because none of the plaintiffs had filed a timely charge with the Equal Employment Opportunity Commission, a jurisdictional prerequisite to a civil suit under Title VII. Finally, having found no independent basis for federal jurisdiction, the court held that it lacked the power to exercise pendent jurisdiction over the state law claims. This appeal followed, with appellants challenging only the dismissal of their FCUA and state-law pendent claims. (FN1)

II

We consider first the district court's jurisdictional dismissal of the claims alleging violations of rights secured by the FCUA.

A

Though the district court seems to have analyzed the jurisdictional issue as being whether the necessity to resolve substantial federal questions caused appellants' state-law claims to "arise under" federal law, see, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), it is plain from the record that appellants' invocations of the provisions of the FCUA were by way of asserting federal causes of action allegedly conferred by or implicit in those provisions. Count I of Ridenour's complaint alleges that the defendants' actions in removing him from the Board of Directors of the credit

union "wrongfully and illegally interfered with [his] rights and duties pursuant to 12 U.S.C. Section 1761 and 1761b...." (FN2) Count II alleges wrongful interference with Ridenour's right, under 12 U.S.C. Sec. 1760, to a democratically governed credit union. (FN3) The other plaintiffs allege, inter alia, that they had voted for Ridenour's election to the Board of Directors and that his wrongful removal violated their Sec. 1760 rights to democratic governance of the credit union. All of the plaintiffs asked for damages and injunctive and declaratory relief for these statutory violations.

The appellee's challenge to the existence of federal question jurisdiction over these claims as pleaded is the classic one, that no such claims exist under federal law. To consider such a challenge requires a two-stage approach. At the threshold is the question whether the federal claim as pleaded is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy" so that dismissal for lack of federal jurisdiction is warranted without more. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 94 S.Ct. 772, 776, 39 L.Ed.2d 73 (1974). If that cannot be said, the court of necessity has and must exercise jurisdiction to decide the federal question of whether the cause of action exists. See Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

[1] The preliminary jurisdictional test of facial insubstantiality is a rigorous one against the challenger. The mere claim that a right exists under federal law suffices to avoid summary dismissal unless it is facially insubstantial or frivolous, and even a non-frivolous claim that a remedy may be implied from a federal statute will suffice. See 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters Sec. 3562, at 40-41.

[2] If dismissal for facial insubstantiality is avoided, further inquiry into the existence of federal question jurisdiction of course turns on the existence of the underlying claim as pleaded. The existence of such a claim is of course a necessary predicate for the existence of federal jurisdiction over it. But if it is determined on this inquiry that jurisdiction fails because no such federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim rather than for want of subject matter jurisdiction. See Bell, 327 U.S. at 682, 66 S.Ct. at 776; Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 279, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

[3] Applying this approach, we cannot say as a preliminary matter that the appellants' allegations that federal law gives them causes of action are so wholly insubstantial or patently without merit as to preclude federal jurisdiction. Although we disagree with its holding, at least one federal court of appeals has found a federal cause of action for discharged credit union employees as a matter of federal common law. See Barany v. Buller, 670 F.2d 726 (7th Cir.1982). Because the appellants' contentions that federal law gives them a cause of action are not plainly insubstantial, we must take jurisdiction to address on the merits the federal question of the claims' existence thereby raised. We hold, however, that the asserted federal causes of action do not exist, and we will therefore affirm the district court's dismissal of these claims on the alternative ground that the appellants failed to state a claim upon which relief could be granted.

B

[4] [5] At the outset of our inquiry into the existence of the federal cause of action pleaded, we note that the appellants have not contended that any of the provisions of the FCUA cited in their complaint, 12 U.S.C. Secs. 1760,

1761 and 1761b, gives them an express right of action for the wrongs alleged. Our review of the statute satisfies us that, consistent with the holdings of every court to consider the question, no express right of action can be found in the statute. See, e.g., Barany v. Buller, 670 F.2d 726 (7th Cir.1982); Montford v. Robins Federal Credit Union, 691 F.Supp. 347 (M.D.Ga.1988); National Temple Non-Profit Corp. v. National Temple Community Federal Credit Union, 603 F.Supp. 807 (E.D.Pa.1985). Although the appellants' briefs do not frame their contentions in these terms, they have essentially argued that we might find either an implied right of action in the statute or that we should fashion such a cause of action as a matter of federal common law. As we discuss below, we see no warrant for recognizing a cause of action by resort to either approach.

(1)

The question whether an implied right of action may be found in federal statutes is basically guided by the multifactored test of Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). But at least since Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), it has been clear that the ultimate question will always be whether Congress intended to create the asserted cause of action, that the other Cort factors are merely subsidiary to that inquiry. See Thompson v. Thompson, 484 U.S. 174, 108 S.Ct. 513, 521, 98 L.Ed.2d 512 (Scalia, J., concurring) (1988); California v. Sierra Club, 451 U.S. 287, 293, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101 (1981); Transamerica Mortgage Advisors (TAMA) v. Lewis, 444 U.S. 11, 23-24, 100 S.Ct. 242, 249, 62 L.Ed.2d 146 (1979); Touche Ross, 442 U.S. at 575-76, 99 S.Ct. at 2488-89. We focus, then, on the evidence, if any, that Congress intended to create a cause of action for the kinds of wrongs alleged to

have occurred in Ridenour's removal from the board of directors.

The appellants appear to be correct in their general assertions that the statutory provisions under which they claim were designed to promote the democratic governance of their local credit unions. See LaCaisse Populaire Ste-Marie (St. Mary's Bank) v. United States, 563 F.2d 505, 509 (1st Cir.1977) (democratic control and management of credit unions significantly distinguishes credit unions from savings and loan institutions). It does not follow, however, from the general observation that Congress afforded members some opportunities to participate in the governance of their credit unions that it also intended to allow members to bring private actions for alleged irregularities in the management. The few courts to consider the issue have concluded that the FCUA does not imply a private right of action for wrongful removal from a managerial, supervisory, or employee position in a federal credit union. See, e.g., Barany, 670 F.2d at 730-31; Heiskala v. Johnson Space Center Federal Credit Union, 474 F.Supp. 448 (S.D.Tex.1979). Furthermore, the appellants have brought to our attention no positive indicia of legislative intent to create a cause of action. More significantly, our review of the statutory structure reveals two features of the statute that persuade us to the contrary that Congress intended not to create the asserted causes of action.

Section 1786 of the FCUA authorizes the Board of the NCUA to take a variety of administrative actions against federal credit unions and persons affiliated with them to safeguard the undoubted federal interest in the financial security of federal credit unions. See Amicus Curiae Brief of The National Credit Union Administration at 2-3. The Board may, for instance, terminate the insured status of credit unions, 12 U.S.C. Sec. 1786(a), issue cease and desist orders, Sec. 1786(f), or remove from office "institution-affiliated" parties such as officers and directors of local credit unions,

Sec. 1786(g)(1). When the Board removes a person from office pursuant to the power in Sec. 1786(g)(1), that person is entitled to an administrative hearing, Sec. 1786(g)(4), and to judicial review of the administrative ruling in the appropriate United States Court of Appeals or in the United States Court of Appeals for the District of Columbia Circuit, Sec. 1786(j)(2). Had Ridenour been removed by the Board of the NCUA, he presumably would have been able to avail himself of this remedial structure. But in Congress' decision to afford some protection to a credit union-affiliated party who is removed by the national Board, we see a strong negative inference that Congress did not deem the removal of a director by his fellow members on a local credit union's board sufficiently important to warrant creating a federal cause of action. (FN4)

Recent amendments to the FCUA provide even more immediate evidence of a lack of congressional intent to create the cause of action urged by appellants. In August 1989, the FCUA was amended in conjunction with a massive restructuring of federal law governing certain financial institutions. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRRE), Pub.L. No. 101-73, 1989 U.S.Code Cong. & Admin.News (103 Stat.) 183. Although the bulk of FIRRE was directed towards reforming the savings and loan industry, several of its provisions affected the NCUA. Most noteworthy for present purposes was Section 932 of FIRRE, which amended the NCUA to create a new cause of action for whistleblowers, now codified at 12 U.S.C. Sec. 1790b. In enacting that amendment, Congress recognized a need to protect all credit union employees who report violations of law to the national Board or to the Attorney General. (FN5) In light of the fact that Congress has so recently spoken to the question of credit union employee job protection, we are not prepared to find a congressional intent to allow a cause of action for discharge

or removal under circumstances other than those now specifically identified as the basis for private rights of action. Congress' silence on the subject during the enactment of FIRRE supports the view that it did not intend alleged violations of Secs. 1760, 1761, and 1761b to be the subject of private actions.

(2)

[6] Appellants also argue that there is federal subject matter jurisdiction over their claims because of the unique federal interests implicated by the governance and personnel policies of federal credit unions. As discussed above, we have jurisdiction to consider the jurisdictional argument because it raises nonfrivolous federal questions about the existence of the asserted causes of action. To the extent, however, that the appellants by their reliance on Barany v. Buller, 670 F.2d 726 (7th Cir.1982), may be suggesting that unique federal interests in this context should lead us to fashion a federal remedy as a matter of federal common law, we decline to do so. In so declining, we respectfully disagree with the contrary holding of the Seventh Circuit in Barany.

Though there is "no federal general common law," Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), there is a recognized "need and authority" for federal courts to create specific federal common law in some carefully limited circumstances. Texas Industries v. Radcliff Materials, 451 U.S. 630, 640, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981). Broadly, the appropriate occasion may arise in two types of cases: where a federal rule of decision is "necessary to protect uniquely federal interests," id. (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964)), and where Congress has empowered the courts to fashion a body of substantive law, see, e.g., Textile

Workers v. Lincoln Mills, 353 U.S. 448, 456-57, 77 S.Ct. 912, 917-18, 1 L.Ed.2d 972 (1957). Only the first could possibly be present here, and we think it is not.

The category of unique federal interests justifying the creation of federal common law has been sharply circumscribed by the Supreme Court. Sufficient interests have been found only in cases involving "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty...." Texas Industries, 451 U.S. at 641, 101 S.Ct. at 2067.

Most critical here is the principle that when Congress has legislated on a question that is claimed to be appropriate for the creation of federal common law, courts must assume that Congress has articulated all of the governing federal standards. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943) (federal common law may be invoked only "in absence of an applicable Act of Congress"); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978) (when federal legislation "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."). See also, M. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv.L.Rev. 881, 925 (1986).

Application of that principle here precludes our undertaking any effort to fashion the body of federal common law urged by appellant. As noted in Part II B(1), Congress originally provided administrative and judicial remedies for a credit union-affiliated party when removed by the national Board, but in no other circumstances. More recently, Congress has amended the statute to create a remedy for whistleblowing employees and managers who report to the Board or to the Attorney General, but not when

the matter is handled by the local credit union's supervisory committee. Perhaps most significant of all may be the NCUA's choice not to give the bylaws that govern removal of board members the authority of an agency regulation: "Federal courts lack authority to impose more stringent [standards] under federal common law than those imposed by the agency charged by Congress with administering the comprehensive scheme." City of Milwaukee v. Illinois, 451 U.S. 304, 320, 101 S.Ct. 1784, 1794, 68 L.Ed.2d 114 (1981).

III

[7] As indicated, the district court dismissed all the state claims on the basis that once the federal claim was dismissed for lack of jurisdiction, so too must be the state claims because of their lack of any independent jurisdictional basis. As we have held, however, the federal claims under the FCUA were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits. That sufficed to support pendent jurisdiction over the state-law claims even if the federal claims were, as they should have been, then dismissed on the merits. See generally 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters Sec. 3564, at 74-75. Dismissal of the state-law claims for lack of an independent basis of jurisdiction was therefore improper. See Webb v. Bladen, 480 F.2d 306, 309-10 (4th Cir.1973). Although the court might have dismissed them in an exercise of its discretion under United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), it did not of course purport to exercise that discretion. Though we might attempt to do so in the first instance, we do not think we should, but should instead remand to allow the district court to exercise its discretion on the matter. See Webb, 480 F.2d at 310. The usual rule--once indeed expressed as a flat

one, see Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139--is that where federal claims are dismissed before trial, any pendent state claim should go out as well. But it is now recognized that there can be exceptions based upon unusual circumstances, such as statutes of limitation problems that warrant retention of the claims for resolution even after threshold dismissal of federal claims. See Rosado v. Wyman, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970) (amount of time and energy already expended a factor to be considered). We are in no position to know whether there might be any such reasons here for going against the usual rule of dismissal in threshold stages. Accordingly we will remand the state-law claims to the district court for determination there whether they should be dismissed without prejudice or retained for resolution under the pendent jurisdiction.

IV

In summary, we affirm dismissal of the Title VII and FCUA claims, but we vacate that part of the judgment dismissing the FCUA claims on jurisdictional grounds and remand for entry of a judgment dismissing them on the merits. We vacate that part of the judgment dismissing the state-law claims for lack of jurisdiction and remand those claims for determination whether they should be dismissed without prejudice or retained for decision under the pendent jurisdiction.
SO ORDERED.

FN1. Apart from unhelpful conclusory statements that federal courts have jurisdiction to hear such claims, the appellants have not challenged the district court's critical ruling that no EEOC complaint was ever filed by any of the plaintiffs. This unchallenged finding supports dismissal of all the Title VII claims.

FN2. Ridenour does not specifically identify which provisions of 12 U.S.C. Secs. 1761 and 1761b give him the right of action he asserts. Title 12 U.S.C. Sec. 1761 establishes the management structure of credit unions and contains provisions relating to the composition of the board, supervisory committee, and the credit committee and to compensation for board and committee members:

> (a) The management of a Federal credit union shall be by a board of directors, a supervisory committee, and where the bylaws so provide, a credit committee. The board shall consist of an odd number of directors, at least five in number, to be elected annually by and from the members as the bylaws provide. Any vacancy occurring on the board shall be filled until the next annual election by appointment by the remainder of the directors.
>
> (b) The supervisory committee shall be appointed by the board of directors and shall consist of not less than three members nor more than five members, one of whom may be a director other than the compensated officer of the board. A record of the names and addresses of the executive officers, members of the supervisory committee, credit committee, and loan officers, shall be filed with the Administration within ten days after their election or appointment.

(c) No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

12 U.S.C. Sec. 1761b provides a partial listing of the powers and duties of the board of directors of a Federal credit union:

> The board of directors shall meet at least once a month and shall have the general direction and control of the affairs of the Federal credit union. Minutes of all meetings shall be kept. Among other things, the board of directors shall--
>
> (1) act upon applications for membership or appoint membership officers from among the members of the credit union, other than the board member paid as an officer, the financial board officer, any assistant to the paid officer of the board or to the financial officer, or any loan officer;
>
> (2) provide adequate fidelity coverage for officers and employees having custody of or handling funds according to regulations issued by the Board;

(3) fill vacancies on the board of directors until successors elected at the next annual meeting have qualified;

(4) if the bylaws provide for an elected credit committee, fill vacancies on the credit committee until successors elected at the next annual meeting have qualified;

(5) appoint the members of the supervisory committee and, if the bylaws so provide, appoint the members of the credit committee;

(6) have charge of investments including the right to designate an investment committee of not less than two to act on its behalf;

(7) determine the maximum number of shares, share certificates, and share draft accounts, and the classes of shares, share certificates, and share draft accounts;

(8) subject to any limitations of this subchapter, determine the interest rates on loans, the security, and the maximum amount which may be loaned and provided in lines of credit;

(9) authorize interest refunds to members of record at the close of business on the last day of any dividend period from income earned and received in proportion to the interest paid by them during that dividend period;

(10) if the bylaws so provide, appoint one or more loan officers and delegate to these officers the power to approve or disapprove loans, lines of credit, or advances from lines of credit;

(11) establish the par value of the share;

(12) subject to the limitations of this title and the bylaws of the credit union, provide for the hiring and compensation of officers and employees;

(13) if the bylaws so provide, appoint an executive committee of not less than three directors to act on its behalf and any other committees to which it can delegate specific functions;

(14) prescribe conditions and limitations for any committee which it appoints;

(15) review at each monthly meeting a list of approved or pending applications for membership received since the previous monthly meeting together with such other related information as it or the bylaws require;

(16) provide for the furnishing of the written reasons for any denial of a membership application to the applicant upon the written request of the applicant;

(17) in the absence of a credit committee, and upon the written request of a member, review a loan application denied by a loan officer;

(18) declare the dividend rate to be paid on shares, share certificates, and share draft accounts pursuant to the terms and conditions of section 1763 of this title;

(19) establish and maintain a system of internal controls consistent with the regulations of the Board;

(20) establish lending policies; and

(21) do all other things that are necessary and proper to carry out all the purposes and powers of the Federal credit union, subject to regulations issued by the Board.

FN3. Title 12 U.S.C. Sec. 1760 provides for meetings of credit union members and establishes voting rights and procedures:

> The fiscal year of all Federal credit unions shall end December 31. The annual meeting of each Federal credit union shall be held at such place as its bylaws shall prescribe. Special meetings may be held in the manner indicated in the bylaws. No member shall be entitled to vote by proxy, but a member other than a natural person may vote through an agent designated for the purpose. Irrespective of the number of shares held, no member shall have more than one vote.

FN4. Indeed, even the NCUA's Board has made it its policy not to become involved in disputes concerning the democratic governance of local credit unions "unless the matter also presents an issue regarding the financial safety and soundness of the operation of the credit union." Amicus Curiae Brief of the National Credit Union Administration at 2. This policy choice is reflected in the Board's decision not to seek to give the bylaws governing the internal administration of credit unions the effect of agency regulation. Id. at 9.

FN5. Even had the appellants sued under this new cause of action, they would have failed to state a claim since they have not alleged that they reported possible violations of law to the NCUA Board or to the Attorney General.

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June 23, 2000

BY FEDERAL EXPRESS

Patricia S. Connor, Clerk
United States Court of Appeals
for the Fourth Circuit
1100 E. Main Street
Richmond, VA 23219

Re: New Horizon of NY, LLC v. Robert Jacobs, et al.
Nos. 99-1990 & 99-1996 (Consolidated)

Dear Ms. Connor:

On June 9, 2000, the Appellee submitted a letter to the Court pursuant to Rule 28(j) of the Federal Rules of

Appellate Procedure. This letter provides additional citations responding to that letter: Manway Constr. Co. v. Housing Authority of Hartford, 711 F.2d 501 (2d Cir. 1983); Equal Employment Opportunity Comm'n v. Local 40, 76 F.3d 76 (2d Cir. 1996).

During oral argument held on June 6, 2000, Judge Motz also inquired where in the record it appears that the defendants made the argument that an appeal with a legitimate basis in law cannot be the basis for tort or contract liability under the Noerr-Pennington doctrine. The following is a list of the record references to the substantive argument that the appeal was legally justified and cannot, therefore, be the basis for liability.

- Defendants Lane, Rosen, Scharf and DaPuzzo's Memorandum in Support of Their Motion for Summary Judgment (J.A. 39T, docket entry 215), at 3-12.
- Plaintiff's Memorandum in Opposition to Motions for Summary Judgment of Defendants Lane, *et al.*, and in Support of Cross-Motion for Partial Summary Judgment (J.A. 39W, docket entry 259), at 19-26, 43-44.
- Memorandum of Defendants Ira Born, David Queller and David Queller, Inc. In Support of Motion for Summary Judgment (J.A. 39T, docket entry 221) at 14, ("Whether or not the appeal prevailed, if it had merit, or even if the appellants reasonably believed it had merit, Plaintiff has no case.").
- Memorandum of Authorities for Defendants Lane, *et al.*, (J.A. 13, docket entry 51), at 2-6.
- Plaintiff's Memorandum of Authorities on the Contested Issues of Law (J.A. 12, docket entry 75), at 3 note 2.
- Amended Trial Memorandum of Defendants Robert Jacobs, *et al.* (J.A. 13, docket entry 51), at 3 note 2.
- Pretrial Order (J.A. 131, 333-35), at 23, 25A, 25B, 25C.

The Noerr and Pennington cases were not specifically cited by the defendants. (In Cardtoons, L.C. v. Major League Baseball Players Association, 209 F.3d 885 (10th Cir. 2000), the Court of Appeals for the Tenth Circuit observed that the Noerr and Pennington precedents are not suitable authorities of the First Amendment claim outside antitrust law.) The sufficiency of such argument to warrant consideration by this Court is supported by Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861, 866 n.1 (4th Cir. 1999); Finn v. Schiller, 72 F.3d 1182, 1190 (4th Cir. 1996). The issue is a question of law, and refusal to consider it would result in a miscarriage of justice. Skinner v. City of Miami, 62 F.3d 344, 348 (11th Cir. 1995) cert. denied, 520 U.S. 1165 (1997); Roberts v. Van Buren Public Schools, 773 F.2d 949, 955 (8th Cir. 1985).

Enclosed for filing are the original and four copies of this letter. I would appreciate your returning to me a file-stamped copy in the enclosed, pre-paid envelope. Thank you for you assistance. Should you have any questions, please call me at (202) 293-6400.

Sincerely,

Nathan Lewin

cc: Charles R. Holton, Esq.
James G. Exum, Jr., Esq.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

Nov 14 10 01 AM '00

U.S. COURT OF APPEALS
FOURTH CIRCUIT

Nos. 99-1990, 99-1996

NEW HORIZON OF NEW YORK, LLC
Plaintiff-Petitioner,

v.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; and RUTH SCHARF,
Defendants-Respondents.

On Appeal from the United States District Court for the Eastern District of North Carolina Western Division

PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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COUNSEL'S STATEMENT OF PURPOSE

The opinion issued by a panel of this court on November 2, 2000, *New Horizon of NY LLC v. Jacobs*, ____ F.3d ____ (4th Cir. 2000) (the "Opinion") vacated the judgment of the district court and remanded the matter to the district court for dismissal without prejudice for lack of subject matter jurisdiction. The opinion overlooked or misapplied several material points of law. These are as follows:

1. The panel overlooked petitioner New Horizon's argument that federal question jurisdiction existed in this case pursuant to this court's precedent and 18 U.S.C. § 401, and that the district court properly exercised supplemental jurisdiction over the state law claims.

2. The panel based its conclusion regarding the merits of the federal contempt claim on an incorrect analysis of collateral estoppel which was, in any event, not material to the issue of "related to" jurisdiction.

3. The panel misapplied the proper standard for determining "related to" jurisdiction over the state law claims.

These points must be considered in order to afford New Horizon a full and fair resolution of this appeal.

PETITION FOR REHEARING

I. THE PANEL OVERLOOKED PETITIONER'S ARGUMENT THAT THE DISTRICT COURT HAD FEDERAL QUESTION SUBJECT MATTER JURISDICTION OVER THE CONTEMPT CLAIM AND PROPERLY EXERCISED SUPPLEMENTAL JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

A. The existence of federal question jurisdiction pursuant to this court's precedent and 18 U.S.C. § 401 was argued to the court and supported with supplemental authorities after argument.

At oral argument on June 6, 2000, the panel questioned whether there were bases for federal question subject matter jurisdiction, other than the "related to" jurisdiction specifically advanced by petitioner and contested by respondent. Counsel responded that the civil contempt claim provided an independent basis for federal question jurisdiction. The panel further suggested the doctrine of supplemental or pendent jurisdiction over the state law claims.

On June 12, petitioner filed supplemental authorities in a non-argumentative format pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Local Rule 28(e). The authorities supported petitioner's argument that the contempt claim for damages provided an independent basis for federal question jurisdiction, and that the district court also had supplemental jurisdiction over the state law claims. On June 23, 2000, the appellants responded to the June 12 submission, citing two cases on the jurisdictional issue.

Notwithstanding the two distinct arguments made to support the existence of subject matter jurisdiction, the panel held only that "the district court did not have related to jurisdiction under 28 U.S.C. § 1334 in this case." Opinion at 21. At footnote 17, the panel mistakenly observed that "[o]ther federal question jurisdiction or diversity of citizenship is not claimed in this case." *Id.* at 13 n.17. The panel therefore failed to consider the other compelling basis for federal question jurisdiction advanced by the petitioner.[1]

B. Federal question jurisdiction exists pursuant to this court's precedent and 18 U.S.C. § 401.

This court has recognized the federal cause of action for damages resulting from civil contempt. *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995), and cases cited therein; *Folk v. Wallace Business Forms, Inc.*, 394 F.2d 240, 244 (4th Cir. 1968) ("No one seriously questions the right of the Court to award civil contempt damages which have long been recognized"). In addition, 18 U.S.C. § 401 vests jurisdiction in the U.S. courts to enforce their own orders -- "[a] court of the United States shall have power to punish . . . contempt of its authority, and none other . . . ." 18 U.S.C. § 401. The district court, therefore, had exclusive jurisdiction to determine the appropriate remedy for violation of the order of the bankruptcy court, as the order in question was issued by the bankruptcy court as a "unit" of the district

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[1] Having been raised by counsel and the panel at oral argument and supported with the Rule 28(j) submission, the additional basis for federal subject matter and supplemental jurisdiction is properly before this court and should have been considered. The argument was also previously advanced by New Horizon below in response to respondents' motion to dismiss for lack of subject matter jurisdiction. In any event, 28 U.S.C. § 1653 would permit amendment of the pleadings were it found to be necessary.

court. *See United States v. Guariglia*, 962 F.2d 160, 163 (2d Cir. 1992) (bankruptcy court order deemed issued by a "unit" of the district court).

C. The district court properly exercised supplemental jurisdiction over the pendent state law claims.

The federal contempt claim, as pled, was at least substantial enough to cause the district court to address its merits and to exercise supplemental jurisdiction over the pendent state law claims which derive from a common nucleus of operative fact. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).[2] This court applied that principle in *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715 (4th Cir. 1990), a case cited and forwarded to the court in the Rule 28(j) submission. In *Ridenour*, the district court dismissed the federal count for lack of jurisdiction and subsequently dismissed the state law claims for lack of any independent jurisdictional basis. This court upheld dismissal of the federal claim, but vacated the portion of the judgment dismissing the state law claims and remanded for the district court to exercise its discretion to retain the state law claims under pendent jurisdiction, or to dismiss those claims without prejudice.

In *Ridenour*, the merits dismissal of the federal claim occurred before trial when it appeared that there was no express or implied right of action under the federal statute asserted by the plaintiffs for the alleged wrongs. This court

---

[2] It cannot be and has never been argued that the asserted state law claims are separate and distinct in their operative facts from the contempt count. Indeed, the federal claim is addressed to the appellants' contempt of the same Confirmed Plan that is central to the interrelated state law claims for breach of contract and business torts. (J.A. 65-66, 1264, 1272-1273, 1650-1651, 2648-2650, and 2773.)

cited to substantial authority that because the federal claims were sufficient enough as pled to invoke federal jurisdiction to inquire into their merits, they were also sufficient to support pendent state law claims.[3] *Id.* at 715.

The case *sub judice* is even more compelling than *Ridenour*. Here, the federal contempt claim is indeed one recognized by statute and case law from this circuit, and it survived numerous procedural and substantive challenges before two lower courts. Although the district court ultimately found in respondents' favor on the contempt claim, that was only after a full merits trial.

Petitioner has failed to locate any authority whatsoever that would support this court's dismissal of the pendent state law claims after trial and where the claim upon which federal jurisdiction rested received a trial on the merits. Nor is there any authority for the dismissal of this entire case based upon this court's merits analysis that the contempt claim was collaterally estopped. *See* discussion *infra* at 8-9. The collateral estoppel defense focused upon by the court is no more dispositive of the jurisdictional question than was the *Ridenour* plaintiffs' failure have had any statutory right of action at all. Yet, in *Ridenour*, even though dismissal of the unmeritorious federal claim occurred before trial, this court saw fit to allow the district court to exercise its discretion to retain the pendent state claims for trial. *See* 28 U.S.C. § 1367(c) ("district courts may decline to exercise supplemental jurisdiction"). There has been no proviso for the exercise of similar discretion in the case at hand.

Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995) is also instructive. There this court reversed the district court's

---

[3] It is instructive that the federal claim asserted in *Ridenour* which was sufficient enough for a merits inquiry turned out not to be grounded in any express or implied statutory right of action. *Id.* at 719-21. In spite of that fatal flaw, this court deemed the failed federal count sufficient to support the pendent state claims.

dismissal of the pendent state law claims once the judge had found that the basis for federal diversity jurisdiction no longer existed. This court emphasized that the district judge had the discretion to retain the state law claims and had the obligation to exercise that discretion, enjoying "wide latitude" in so doing. *Id.* at 110. Among the factors which this court noted to be considered were "the amount of time and energy that has already been expended," as well as "convenience and fairness to the parties" and "the interests of judicial economy." *Id.* at 110, 112. Surely these factors would require retention of supplemental jurisdiction in the case at hand.

The panel's manifest failure to acknowledge this additional legitimate and compelling basis for federal question subject matter jurisdiction and supplemental jurisdiction has resulted in an extraordinary and unfair outcome. This court must therefore vacate its order and reinstate the district court judgment with respect to which it had federal subject matter and pendent jurisdiction.

II. THE PANEL BASED ITS CONCLUSION REGARDING THE MERITS OF THE FEDERAL CONTEMPT CLAIM ON AN INCORRECT ANALYSIS OF COLLATERAL ESTOPPEL WHICH WAS, IN ANY EVENT, NOT MATERIAL TO THE ISSUE OF "RELATED TO" JURISDICTION.

A. Appellants never pled, preserved for appeal, or briefed the collateral estoppel defense as a basis to defeat federal "related to" jurisdiction, and the panel misapplied the governing law.

The panel stated "it is patent that the civil contempt count, on which New Horizon bases its claim in this case of

related to jurisdiction under § 1334, is nothing more nor less than a collateral attack on the order of the bankruptcy court of February 6, 1997." Opinion at 16. This conclusion, which was the primary support for the panel's decision, was based on the application of the affirmative defense of collateral estoppel, which was never pled, preserved by appellants as an argument on appeal, nor briefed by the appellants. As a result, petitioner has heretofore never had any opportunity to brief this issue to this court.

The panel's determination wholly disregarded the decision of the bankruptcy judge that he had never previously considered the allegations underlying the contempt motion and did not adjudicate it. *See* Opinion at 10 n.13. This court has observed that "a bankruptcy court's interpretation of its own order . . . warrants 'customary appellate deference.' The bankruptcy court was 'in the best position to interpret its own orders.'" *Colonial Auto Center v. Tomlin* (*In re Tomlin*), 105 F.3d 933, 941 (4th Cir. 1997) (quoting *Texas N.W. Ry. Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 860 F.2d 267, 272 (7th Cir. 1988)). In *Tomlin*, this court observed that the bankruptcy court's direct engagement in the earlier proceedings and its "better vantage point" make it best qualified to make determinations with respect to its earlier orders. *Tomlin*, 105 F.3d at 941. Here, the panel ignored this principle of appellate restraint and actually criticized the bankruptcy judge for exercising the "luxury of hindsight" in interpreting his own prior order. Opinion at 16. What else besides "hindsight" does a trial judge have to interpret his prior order as to what was or was not a basis for his decision?

Finally, in its peremptory conclusion that collateral estoppel applied to bar the contempt of court claim, this court ignored the black-letter law that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Arizona v.*

California, 120 S. Ct. 2304, 2319 (2000), citing Restatement (Second) of Judgments § 27, p. 250 (1982).

There has been no showing whatsoever that the order entered by the bankruptcy court on February 6, 1997 was, in fact, an adjudication on the merits of New Horizon's subsequent damages claim for civil contempt. Indeed, New Horizon's motion, which precipitated the February 6 Order, sought only an order directing the appellants to appear and show cause why they should not be held in contempt. In denying the motion at that time, the bankruptcy judge held only that he would not order the defendants to appear and show cause. There is no reason to suggest that either the bankruptcy judge, or later the district court judge, could not subsequently determine, based upon substantial additional evidence obtained through discovery and presented to the court, that the appellants should, indeed, appear and show cause why they were not liable for civil contempt. This is precisely what the lower courts did.

B. The panel's focus on the merits of collateral estoppel was immaterial to the issue of jurisdiction.

Whether the panel was right or wrong on the merits of the application of the collateral estoppel doctrine to the civil contempt claim is immaterial to the question of whether "related to" jurisdiction exists.[4] This panel made an improper leap of logic to find that because they concluded that the claim was barred by collateral estoppel, there was no jurisdiction for the trial court to hear the claim in the first place. *Spartan Mills v. Bank of America Illinois*, 112 F.3d

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[4] The district court ultimately found in respondents' favor on the contempt claim on other grounds, and petitioner did not appeal from that judgment. Thus, the merits of that claim were not even before this court.

1251 (4th Cir. 1997), *cert. denied*, 522 U.S. 969 (1997), cited by the panel, actually demonstrates this point.

In *Spartan Mills*, this court held that it would not permit a collateral attack in the United States District Court for the District of South Carolina on a prior order of the United States Bankruptcy Court for the Southern District of Florida. This court did not hold, however, that the United States District Court for the District of South Carolina lacked jurisdiction to hear the claim. Rather, it merely upheld the district court's determination on the merits that the claim was barred by collateral estoppel.

Likewise, *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), also relied on by the panel, shows a similar result. There the Supreme Court clearly articulated the broad standards for "related to" jurisdiction in the bankruptcy court and held that a district court could not collaterally attack the decision of the bankruptcy court. 514 U.S. at 313. The court did not hold that the district court lacked jurisdiction to hear the claim or any other pendent state law claims. In the present case there is no support for the panel's logical jump from a collateral estoppel defense to a conclusion of lack of subject matter jurisdiction.

III. THE PANEL MISAPPLIED THE PROPER STANDARD FOR DETERMINING "RELATED TO" JURISDICTION AND IMPROPERLY APPLIED A RETROSPECTIVE ANALYSIS TO REACH ITS CONCLUSION THAT "RELATED TO" JURISDICTION DID NOT EXIST.

A. The standard for "related to" jurisdiction.

This court has adopted the majority standard for determining "related to" jurisdiction, which is stated as follows:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property.

In re Celotex Corp., 124 F.3d 619, 625 (4th Cir. 1997) (citations omitted) (emphasis in original).

New Horizon's claims went to the heart of the Confirmed Plan that was under administration by the bankruptcy court at the time the lawsuit was filed. The related to test does not require "certain or likely alteration of the debtor's rights, liabilities, options or freedom of action . . . [but only] [t]he possibility of such alteration or impact." *Id.* at 626 (citing *In re Titan Entergy, Inc.*, 837 F.2d 325, 330 (8th Cir. 1988)).

B. The analysis of "related to" jurisdiction must consider the facts as they existed at the time of filing.

This circuit has applied the rule that if "related to" jurisdiction existed at the commencement of the action, a later event in the bankruptcy proceeding can not divest the court of subject matter jurisdiction that it once had. *Celotex*, 124 F.3d at 626 (citing *Freeport McMoRan, Inc. v. K N Energy Inc.*, 498 U.S. 426, 428 (1991) ("if jurisdiction exists ***at the time an action is commenced***, such jurisdiction may not be divested by subsequent events") (emphasis added)). This court acknowledged in *Celotex*, therefore, that its "analysis may not be informed by our knowledge of the Confirmed Plan or Rapid's settlement with the Celotex bankruptcy estate." *Celotex*, 124 F.3d at 626.

Here, the panel ignored these basic principles and considered events that occurred in connection with the bankrupt estate **after** the commencement of this litigation in February 1997, and on that basis divested the district court of the subject matter jurisdiction that it had. At page 20 of the Opinion, the panel stated that it was basing its finding upon such facts that the notes were sold to another purchaser in September 1997 for a higher price (yielding a benefit to the Tudor estate),[5] and that "the AJ estate was settled months before, and unaffected by the **trial** in this case" (emphasis added). Opinion at p. 20. The question before the court was not whether the outcome of the New Horizon trial did have an effect on the debtor's estate, as implied by the panel's comments, but rather whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy, as of the time of filing. *Celotex*, 124 F.3d at 625.

C. At the time of filing of the complaint, it was clear that the outcome of the proceeding could have a conceivable effect on the AJ Estate in bankruptcy.

At the time of filing this lawsuit in February 1997, the AJ Confirmed Plan was in the midst of administration, with the primary source of funding having been lost because of the failure of the sale of the notes to New Horizon. The notes still had to be sold to someone in order to fund and effectuate the Plan. New Horizon, along with others, continued to be a leading candidate to purchase the notes.

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[5] The very suggestion of this fact highlights the error in the panel's analysis. What if the notes were sold in September 1997 for less than what New Horizon was prepared to pay? Certainly this would impact the Tudor and the AJ estates. Standing in February 1997, this possibility was every bit as conceivable as what actually occurred.

New Horizon asserted in the complaint that the defendants had breached the contract – the Confirmed Plan – which breach caused its exclusive option to fail. It was conceivable, at the time of filing, that the defendants would raise any or all of the following defenses to that claim:

1. that they were forced by duress to consent to the Plan, and, therefore, the Plan was invalid;
2. that the Plan required an interpretation whereby the notes could only be sold with financing of no more than seventy-seven percent (77%) of the cash flow of the underlying properties;
3. that the Plan was unenforceable because of the unclean hands of the Plaintiff, or its managers;
4. that New Horizon was not an acceptable or permissible purchaser of the notes because a sale to New Horizon would lead to income tax recapture; and
5. that there was no specific or definite provision of the Order Confirming Plan that had been violated with regard to New Horizon's contempt count.

Given these positions, ***all of which the defendants actually argued to the bankruptcy court and/or the trial court*** (J.A. 2817-24, 79, 125-28, 130, 132, 334, 345-49, 2655-56), it was entirely conceivable at the commencement of this lawsuit that the outcome of this case could have considerable effect on the AJ Plan then being administered. Consider the following:

- What if the lower court ruled that the Plan was void for duress or illegality?
- What if the lower court ruled that New Horizon could not be a purchaser of the notes because of purported concerns for tax recapture?
- What if the lower court ruled that a sale was violative of the Plan if it involved financing greater than 77% of cash flow?

Surely it can be understood that rulings such as these could and would have a direct and substantive effect on the Plan which was then in process of being administered.
Surely it cannot be this Circuit's position that issues such as these must be litigated in state court, while the bankruptcy Plan is in the process of being administered. These circumstances are what the courts below appreciated during the pendency of this lawsuit when they properly found the existence of "related to" jurisdiction. The panel's improper retrospective analysis led to its erroneous conclusion that "related to" jurisdiction did not exist.

CONCLUSION AND SUGGESTION FOR REHEARING *EN BANC*

Based on the foregoing, Petitioner New Horizon of NY requests that the Court rehear this appeal, and suggests that this rehearing occur *en banc*.

Respectfully submitted,
This 13th day of November, 2000.

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner hereby certifies that two copies of the foregoing **Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc*** for New Horizon of New York, LLC were served this 13th day of November, 2000, upon the following by Federal Express delivery:

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